PROTECTING AMERICAN EMPLOYEES FROM WORKPLACE DISCRIMINATION

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

PROTECTING AMERICAN EMPLOYEES FROM WORKPLACE DISCRIMINATION

Tuesday, February 12, 2007

U.S. House of Representatives

Subcommittee on Health, Employment, Labor and Pensions

Committee on Education and Labor

Washington, DC

The subcommittee met, pursuant to call, at 2:00 p.m., in Room 2175, Rayburn House Office Building, Hon. Robert Andrews [chairman of the subcommittee] presiding.

Present: Representatives Andrews, McCarthy, Tierney, Wu, Sanchez, Sestak, Loebsack, Hare, Kline, McKeon, and Boustany.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jordan Barab, Health/Safety Professional; Carlos Fenwick, Policy Advisor for Subcommittee on Health, Employment, Labor and Pensions; Michael Gaffin, Junior Legislative Associate, Labor; Brian Kennedy, General Counsel; Sara Lonardo, Junior Legislative Associate; Joe Novotny, Chief Clerk; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Legislative Assistant; Alexa Marrero, Minority Communications Director; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; and Ken Serafin, Minority Professional Staff Member.

Chairman ANDREWS [presiding]. Ladies and gentlemen, if I may have your attention, we will bring the subcommittee to order. Thank for your attendance here this afternoon. We thank our outstanding panels of witnesses. We are very glad to have you with us.

American employment law is really focused on three principles.

The first is the general rule that employees are at the will of employers, unless there is a contract, collective bargaining agreement, or rule to the opposite. So that means the employer can do pretty much as the employer sees fit.

The second general principle is that there are some exceptions to that first general principle, that an employer may not discriminate on the basis of race, gender, national origin, religion. And we have added to those exceptions some principles that deal with discrimination against the person who serves in the uniform of our country, in the military services, and some other areas.

The third general principle is that, if a person has been wronged in the field of employment discrimination, they should have a remedy which makes them whole for that wrong.

The purpose of today's hearing is to look at some very important current topical issues that deal with whether or not we need to revise some of the rules that flow from those general principles.

I want to say from the outset I think it is a consensus of the committee that the three general principles are held in broad agreement by the members of the committee. We are not about reversing the doctrine of at will employment, we are certainly not about undercutting the notion that discrimination is a perverse phenomenon that we wish to retard, and we are not about the notion that we want to any way subvert the rights of people to recover if they have been wronged.

In fact, the opposite is true. We are interested in exploring some instances where there is at least the question raised of discriminatory treatment, and we are especially interested in also the question of whether or not remedies that exist are, in fact, adequate when there has been a finding of discrimination against a person.

We will have two panels today.

The first panel will deal with three separate, but very important questions.

The first has to do with remedies. If a person has, in fact, been wronged, if there is a finding that a person has been a victim, in the instance of our witness today, of sexual harassment and gender discrimination, is that person afforded a true and complete remedy if that remedy is limited by a mandatory binding arbitration clause? It is a very important question. We are going to hear some testimony on it from both sides.

The second issue we are going to take a look at is those who serve our country in a volunteer capacity, who serve in fire, EMS, other public safety professions, because, although these individuals do not receive monetary compensation, they are absolutely professionals in every respect of the word.

What happens to one of them when they respond to a huge emergency, like a Hurricane Katrina situation, and then attempt to return to work and find out that there is no work to which they can return or that they are not permitted to go in the first place? We will be addressing that question.

Third, this panel will take a look at the issue of those who voluntarily wear the uniform of our country in the armed forces. We have in place a statute that is designed to assure those individuals that when they voluntarily don the uniform of the United States and serve in the military, the civilian job that they left will be there for them when they return.

Times have changed in two respects which caused us to take a look at this general principle.

The first is the huge reliance our country is placing on our Guard and Reserve. There are hundreds of thousands of Americans who have faced extensive deployments and who are members of our Guard and Reserve and serving with great courage and effectiveness around the world. So the long deployments used to be very much the exception and not the rule. Now they are becoming the rule and not the exception, and it raises that issue.

And then the second thing that has changed is the nature of our workforce and simply returning to a job, which may not adequately compensate them, regardless of their standing in a firm. What is necessary to bring that person back to the place that he or she left when they went to serve our country overseas or, frankly, serve our country here at home, if the deployment would leave them here at home?

The second panel today will deal with the question of the extent to which people are protected against religious discrimination in the workplace, and it will focus on the question as to what extent employers who are required by law to give reasonable accommodations are giving reasonable accommodations.

The phrase "reasonable accommodations" has been substantially litigated, and there is a point of view that the phrase has been watered down to the point where it means very, very little so that any de minimis expression by an employer of inconvenience now serves to stand as a substantial burden which would then excuse the employer from making accommodations to a person because of his or her religious preference. So we are going to take a look at that issue in the second panel.

Obviously, this is a sweeping array of issues, and not all of them are related to each other, except that they fall under the rubric of employment discrimination law.

I want to assure my friend, the ranking member, and all the members of the committee that we will approach these issues with due deliberation. I regard this as a first hearing, an initial round of analysis of these issues, because they are quite complex, they do not easily lend themselves to easy solutions.

There have been some points of consensus. Several members of this committee are co-sponsors of legislation that would deal with the problem of volunteer first responders being able to return to their place of employment. It has rather broad bipartisan support.

An amendment similar to that bill was adopted by a wide margin in the context of the Homeland Security Authorization bill earlier this year. There is significant bipartisan support for legislation that would address the question of religious discrimination, as we will hear in the second panel.

But I understand there are significant differences over many of these issues, and we are going to start the process of airing these views out today.

I would just conclude by saying that I view this as an exercise in applying trusted principles to new situations. I do not think we want to undermine the principles from which we started, but we want to understand how those principles apply to some very difficult and very trying situations that we will hear about from many of the witnesses here today.

So I thank the panel for their participation.

I am at this point going to turn to my friend, the ranking member of the subcommittee, for his opening statement, and I would say any other members who wish to submit an opening statement may do so in writing, and it will be made a part of the record.

Mr. Kline?

[The statement of Mr. Andrews follows:]

Prepared Statement of Hon. Robert E. Andrews, Chairman, Subcommittee on Health, Employment, Labor and Pensions

Good morning and welcome to the HELP Subcommittee's hearing on "Protecting American Employees from Workplace Discrimination."

Today the Subcommittee will focus its attention on anti-discrimination protections for our service-members, volunteer firefighters and emergency medical personnel (EMS) personnel, individuals of a particular faith and all Americans with respect to mandatory arbitration clauses in employment contracts. Whether it is a reservist returning home from Afghanistan who has been demoted or a volunteer firefighter whose employer prohibits him from assisting in the rebuilding Louisiana after Hurricane Katrina or a Muslim American who is denied a job because of her hijab "injustice anywhere is a threat to justice everywhere," and therefore, we have a responsible to not allow these instances to go unchecked.

The specific issues we will address today include whether mandatory arbitration clauses in employment contracts usurp an employee's right to judicial review for statutory claims, whether there is a lack of employment protections for volunteer firefighters and EMS personnel, whether there are loopholes in the Uniformed Services Employment and Reemployment Rights Act (USERRA) and whether Title VII of the Civil Rights Act needs to be strengthened to further provide protection for individuals of a particular religion.

A rising number of employers require their employees to sign mandatory arbitration agreements. These agreements force employees to seek redress for any employment dispute through an arbitrator or panel of arbitrators rather than by a judge or jury. While employers see this as a faster and less expensive way to address disputes many employee rights advocates believe these agreements put workers at a huge disadvantage.

We rely on our volunteer firefighters and EMS personnel as the first line of defense in a wide array of emergencies across the country every day including fires, emergency medical incidents, terrorist events, natural disasters, hazardous materials incidents, water rescue emergencies, high-angle and confined space emergencies, and other general public service calls. Despite the invaluable help these first responders provide to our communities, they are often put in the position of having to choose between their jobs and responding to a major disaster.

USERRA was signed into law by U.S. President Bill Clinton on October 13, 1994 in order to protect the civilian employment of non-full time military service members in the United States called to active duty. In spite of these protections, discrimination in the workplace persists. According to a Department of Defense report, more than 33,000 reserve service members from 2001 to 2005 have complained to the agency about a reduction in pay, benefits or even failing to receive prompt reemployment as required by law.

Although Congress amended Title VII of the Civil Rights Act in 1972 to require employers, in cases of religious discrimination, to provide a reasonable accommodation for employees' religious beliefs, individuals continue to get fired, demoted or not hired by an employer due to their religious affiliation without recourse.

I thank all of the witnesses for their testimony today and look forward to having a robust debate on the abovementioned issues.

Mr. KLINE. Thank you, Mr. Chairman.

Good afternoon. Welcome to each of our many, many witnesses.

A particular welcome to Mr. Wood, from Edina, Minnesota. Always nice to have a Minnesotan. And we are actually fleeing cold weather to come here in this 25-degree weather. So it is good to see you.

We have an exceedingly full schedule this afternoon, and I appreciate the chairman's interest in examining this range of issues relating to workplace discrimination. Each of these issues today is important, both to us as policymakers and to the stakeholders and parties whom they impact.

The topics before the subcommittee this afternoon range from broad, sweeping changes in federal employment law to focused, almost rifle-shot tweaks to existing statutes. Each deserves a thorough examination and thoughtful consideration.

As a result, I feel compelled to take this opportunity to raise my concerns with a number of issues surrounding this particular hearing, and I do that, Mr. Chairman, mindful of the fact that you and I are getting ready in the near future to spend several days together traveling to a remote corner of the world and traveling in close quarters.

Let me say first——

Chairman ANDREWS. I get to decide who comes back, John. [Laughter.]

Mr. KLINE. We will see. We will see.

First, I am concerned the subcommittee would convene a hearing on issues of such importance at 2:00 in the afternoon on a day when members are not scheduled to be back in Washington for votes until 6:30 this evening. As my friend and colleague from New Jersey knows, it is perfectly within the majority's right to schedule hearings as they see fit.

However, as he also knows the majority leader sets the House voting schedule weeks in advance, allowing members to make firm commitments back in their district. Members are already faced with numerous competing demands on their time and plan their business back home in their districts according to that schedule. Sometimes a half a dozen of our members are able to attend a hearing. Other times, depending on a range of other commitments, it is just one or two of us.

And I remember one occasion, Mr. Chairman, when the only person here was Senator Ted Kennedy for over an hour. I am not going to let that happen again.

The choice to attend all or part of a hearing should be for the member to determine, and I worry that by scheduling hearings on a day when votes do not begin until the evening, we do a disservice not only to those members, but to the witnesses, some of whom have traveled halfway across the country to appear before us today.

As a matter of substance, I am concerned that today's hearing is spreading our focus too thin. As I mentioned earlier, some of the items before us represent potentially major changes to employment law.

For example, the wholesale elimination of employment arbitration is a proposal that would affect millions of workers and employers. Others are more focused on nuanced tweaks to statutes which have been on the books for years, such as the very specific changes to USERRA that we will hear discussed today.

Some of these proposals have enjoyed broad bipartisan support—I am proud to be a co-sponsor on a bill that you have on one of these efforts—while others, I expect, will break, as is too often the case, very cleanly on party line.

By the way, Mr. Chairman, I want to take this opportunity again to express my displeasure with what I think is an institutional problem here. It is not a Republican problem or a Democrat problem. Or, actually, it is both. And that is how we get witnesses for these hearings.

Unfortunately, when the Republicans were in the majority, two or three times as many of the witnesses were brought forward by Republicans, and under a Democrat majority, it is two-to-one or

three-to-one Democrat witnesses, and I think, on some of these issues, we really ought to hear a more balanced presentation.

And so I would hope as we go forward, we can make it work to make this a little bit more balanced. I do not know if that is the case here today, but it is so often the case.

I understand that this is an election year, and our schedule will be increasingly limited as the year goes on. I also understand the chairman's desire to engage the subcommittee fully on a range of issues. However, I remain concerned we are trying to cram so many disparate issues into one hearing with limited opportunity for member engagement.

And to that end, Mr. Chairman, I was very pleased to hear you say that you assume that this is a first step towards evaluating this, and we are not going to put a check in the block for holding the hearing when we have jammed all this together.

And with those remarks, Mr. Chairman, again, I want to welcome the many witnesses, and I yield back the balance of my time.

Prepared Statement of Hon. John Kline, Ranking Republican Member, Subcommittee on Health, Employment, Labor, and Pensions

Good afternoon, Mr. Chairman, and welcome to each of our witnesses. We have an exceedingly full schedule this afternoon, so I will keep my remarks brief.

I appreciate today's hearing, and the Chairman's interest in examining a range of issues relating to workplace discrimination. Each of the issues we will examine today is important, both to us as policymakers, and to the stakeholders and parties whom they impact. The topics before the Subcommittee today range from broad, sweeping changes in federal employment law to focused, almost "rifle-shot" tweaks to existing statutes. Each deserves a thorough examination and thoughtful consideration.

As a result, I feel compelled to take this opportunity to raise my concerns with a number of issues surrounding this hearing.

First, I am concerned that the Subcommittee would convene a hearing on issues of such importance at two o'clock in the afternoon, on a day when Members are not scheduled to be back in Washington for votes until six-thirty this evening. As my colleague from New Jersey knows, it is perfectly within the Majority's right to schedule hearings as they see fit. However, as he also knows, the Majority Leader sets the House voting schedule weeks in advance. Members are already faced with numerous competing demands on their time and plan their business back home in their districts according to that schedule. Sometimes a half dozen of our Members are able to attend a hearing. Other times, depending on that range of other commitments, it's just one or two of us.

But the choice to attend all or part of a hearing should be for the Member to determine. I worry that by scheduling hearings on a day when votes do not begin until the evening, we do a disservice not only to those Members, but to the witnesses (some of whom have traveled halfway across the country) who appear before us.

As a matter of substance, I am concerned that today's hearing is spreading our focus too thin. As I mentioned earlier, some of the items before us represent potentially major changes to employment law. For example, the wholesale elimination of employment arbitration is a proposal that would affect millions of workers and employers. Others are more focused or nuanced tweaks to statutes which have been on the books for years, such as the very specific changes to USERRA ("you-serr-uh") that we will hear discussed today. Some of these proposals have enjoyed broad, bipartisan support, while others I expect will break very cleanly on party lines.

I understand that this is an election year, and that our schedule will be increasingly limited as the year goes on. I also understand the Chairman's desire to engage the Subcommittee fully on a range of issues. However, I remain concerned that by trying to cram so many disparate issues into one hearing, with limited opportunity for Member engagement, we risk becoming "jacks of all trades, masters of none."

I especially raise this point with respect to some of the more sweeping policy proposals before us for the first time today. I want to make myself perfectly clear—if the Subcommittee or the full Committee intends to move forward on any of these proposals—I hope they will not suggest that fifteen minutes of testimony, sand-

wiched between three other issues, represents the thorough examination of issues that the regular order hearing process is intended to provide.

In closing, I am concerned with the way this hearing has come together today. I hope that going forward we can work together to ensure that the important business of this Subcommittee, as well as the time and presence of our witnesses, is given the respect it deserves. I look forward to today's testimony and yield back my time.

Chairman ANDREWS. I thank my friend.

I did want to respond to a couple of the comments.

First of all, I did mean what I said. This should be a first step in a very deliberate process because there are a lot of complicated issues here.

Second, as far as the partisan breakdown of witnesses, as I read it, there is one very noncontroversial bill, and I do not think either of our firefighter representatives would be partisan witnesses. There is broad bipartisan support for that bill.

On the religious issue, I understand there are flight-delay issues, but we were careful to be sure that Mr. Souder who is a co-sponsor of the bill will have an opportunity to speak. I understand he cannot make it, but he had that opportunity. So I am cognizant of that.

Third, I would say about the timing, you know, I am sensitive to that. The problem that we wrestle with—and the gentleman knows this—is that we want to have a hearing that covers a lot of topics, or at least cover some topics in depth, we get interrupted by the voting schedule, and it can really fracture a hearing in such a way we cannot have a very cohesive dialogue. So the gentleman is right.

One tradeoff is that some of the members cannot make it because of other commitments. The tradeoff, though, is we do have a chance to have an uninterrupted cohesive discussion which I hope that we will be able to have today.

But I do take the gentleman's comments in the spirit of cooperation and will attempt to respond accordingly. So we have a good trip to faraway places this weekend, too.

I am going to begin by introducing the witnesses, but we have a colleague and friend from Texas who is going to introduce one of our witnesses.

What I would like to do is read the biographies, Mr. Poe, of the other witnesses, and I know you have a constituent that you want to introduce which we will happily be able to do.

Michael Foreman, who will be our second witness, is the deputy director of legal programs and director of the Employment Discrimination Project for the Lawyers Committee for Civil Rights under the Law. He is also the Lawyers Committee representative on the Leadership Conference of Civil Rights Employment Discrimination Task Force.

Before joining the Lawyers Committee, Mr. Foreman was acting deputy general counsel for the United States Commission on Civil Rights. He earned his bachelor's degree from Shippensburg State College in Pennsylvania and his JD from the Duquesne University School of Law.

Welcome, Mr. Foreman.

Mr. John Alchevsky is a volunteer firefighter in the Town of Jackson Township, Ocean County, New Jersey, home to the Six Flags Amusement Park, which I am sure is a challenge for the firefighting community—I have been there many times—and a lot of good outlet stores, too.

He is a life member of the Cassville Volunteer Fire Company, currently serves as chief of that company. He joined the Cassville Company as a junior firefighter when he was 13 years old, and since then, has served in all the company's executive and command staff line officer positions.

He also serves as a captain in the New Jersey Department of Corrections, a very difficult job, an organization he has served for over 23 years.

Welcome to a fellow New Jerseyian, Mr. Alchevsky.

Alfred Robinson, Jr., is a shareholder with the firm of Ogletree Deakins, specializing in governmental affairs, labor and employment law, and litigation. Before joining the Ogletree firm, he was the acting administrator of the Wage and Hour Division of the United States Department of Labor. Mr. Robinson also served as a member of the South Carolina House of Representatives from 1992 to 2002.

Mr. Wilson, I am sure, would be pleased to know that.

And Mr. Robinson received his Bachelor of Science degree from Washington and Lee University in 1977 and his JD from the University of South Carolina in 1981.

Welcome, sir.

Philip C. Stittelburg—excuse me, Chief—is chairman of the National Volunteer Fire Council. He is a member of the Wisconsin State Firefighters Association and has served as chief of the LaFarge, Wisconsin, Fire Department for 25 years.

Chief Stittelburg is a legal counsel to the NVFC, the LaFarge Fire Department, and the Wisconsin State Firefighters Association. He previously served as NVFC foundation president for 12 years.

Chief, welcome. It is good to have you.

Michael Serricchio is a former employee of Wachovia Bank and a sergeant in the Air Force Reserve. Mr. Serricchio's unit was called to duty shortly after September 11, 2001, and he served a 2-year tour in Saudi Arabia.

Welcome, and thank you for your service to our country.

Mr. George Wood is an employment specialist attorney with the law firm of Littler Mendelson where he focuses on discrimination and other litigation, client counseling and training, and other labor law issues. Mr. Wood served as law clerk to the honorable Douglas K. Amdahl, chief justice of the Minnesota Supreme Court.

Mr. Wood earned his BA from St. Olaf College in 1982 and is JD from the William Mitchell College of Law.

Mr. Wood, welcome.

And, finally, Ms. Kathryn Piscitelli?

Ms. PISCITELLI. Yes.

Chairman ANDREWS. I got it. It is a New Jersey name.

She is a labor and employment lawyer with the firm of Egan Lev & Siwica in Orlando, Florida. Ms. Piscitelli is also a member of the Florida Chapter of the National Employment Lawyers Association,

and she served as chair of the National NELA's USERRA, meaning the Soldiers and Sailors Relief Act, Task Force in 2004.

Ms. Piscitelli has spoken on numerous occasions about USERRA and fair employment practices. She earned her BS from Northern Illinois University in 1975 and—another Duquesne lawyer—earned her JD from Duquesne University in 1983. This is the day of the Iron Dukes on the panel, I guess, today.

Now, before we get to Representative Poe's introduction, the written statements of each of the witnesses have been entered into the record without objection. So we have had the chance to read what you have had to say.

We would ask if you would provide us with a succinct 5-minute summary of your point of view. There is a box of lights in front of you. When the green light is on, it means you are on. When the yellow light goes on, it means you have 1 minute to wrap up your testimony. When the red light goes on, we would ask you to wrap up as quickly as you can.

The reason we would like to do this is we have a lot of witnesses today, we want to hear from each of them, and we want the members present to be able to ask questions and engage in dialogue with the witnesses.

So we are very pleased to recognize—I guess it was Judge Poe before he came here. Is that correct?

Mr. POE. I have been called worse, Mr. Chairman.

Chairman ANDREWS. Sherriff or a judge?

Mr. POE. Judge, yes.

Chairman ANDREWS. In Texas. And he has done a lot of good work on some criminal justice issues, I know, since he has joined the House.

Second term for you, Judge, is it?

Mr. POE. That is correct.

Chairman ANDREWS. And he is going to introduce Ms. Jones who is our first witness.

So, after that happens, Ms. Jones, you are welcome to start your testimony.

Mr. POE. Thank you, Mr. Chairman, Ranking Member Kline. I appreciate the opportunity to be here.

Thank you for allowing me to introduce a brave, young woman, and her name is Jamie Leigh Jones.

Two-and-a-half years ago, Jamie Leigh Jones—her dad called my office in Texas because I represent her and her dad here in the United States Congress. Her dad was distraught and informed me that 20-year-old Jamie was drugged and raped by her KBR coworkers in Iraq and that her own employer was holding her hostage for more than 24 hours. Jamie's dad called me and asked for immediate assistance.

My staff and I contacted the United States Department of State that oversees citizen services, and within 2 days, the State Department dispatched two agents from the U.S. Embassy in Baghdad, rescued Jamie, and brought her back home, and she has retrieved much medical treatment since.

Before Jamie went to Iraq to work for Kellogg Brown & Root, she signed an 18-page employment contract. One of the 18 pages included a binding arbitration clause which stated in part, "You

agree that you will be bound and accept as a condition of your employment that any and all claims that you might have against your employer, including any and all personal injury claims arising in the workplace, must be submitted to binding arbitration instead of the United States court system."

It is argued that this clause requires a sexual assault victim, such as Jamie Leigh Jones, to arbitrate with KBR crimes committed against her by other KBR employees.

When she signed the contract, this 20-year-old young person, Jamie, was interested in only two things, when would she start working and how much would she be paid. Jamie did not have an attorney present to advise her of the content and the full meaning of this 18-page document, especially the binding arbitration clause, nor should she need an attorney present. An employment contract should be easily understood by any layperson seeking a job.

Since Jamie returned to the United States, the perpetrators of this crime still have not been prosecuted by our government, so Jamie now hopes that her offenders can be held liable in civil court.

Jamie's case is not the typical employment dispute. Her civil case is based on underlying criminal accusations and employer nonfeasance. It is one thing to arbitrate employment disputes, but I want to be clear that a rape victim should not be subject to an employment arbitration contract with her employer.

As a former judge, I know the best way to solve these types of accusations is in a courtroom with a jury. This one clause should not prevent Jamie from obtaining justice that she needs and deserves. Her case should be aired in a courtroom, not in the back room of arbitration.

Thank you, Mr. Chairman.

I would like to introduce my constituent, Jamie Leigh Jones.

Chairman ANDREWS. Well, thank you, colleague, Mr. Poe.

And, Ms. Jones, we want to welcome you to the committee. We are very sorry for the ordeal that you have experienced——

Mr. JONES. Thank you.

Chairman ANDREWS [continuing]. And we are impressed by the courage and integrity you have to come here today and tell us about it. So welcome.

STATEMENT OF JAMIE LEE JONES, FORMER HALLIBURTON EMPLOYEE

Mr. JONES. Thank you.

Good afternoon, Mr. Chairman and members of the committee. I want to thank you for having me here as well.

I went to the green zone in Baghdad, Iraq, on July 25, 2005, in support of Operation Iraqi Freedom.

Halliburton, my employer, prior to leaving the U.S., promised me that I would live in a trailer equipped to house two women with a shared bathroom. Upon arrival at Camp Hope, I was assigned to a predominantly all-male barrack. I complained about my living conditions to Halliburton's management and asked to be moved into my promised living quarters. These repeated requests were denied.

On the fourth day in Iraq, I noticed the woman I was replacing and several others were outside. They called me over and invited me to come sit with them. When I did, I was offered a drink. The men, identified only as Halliburton firefighters, told me that one of them can make a good drink. So I accepted.

When he handed it to me, he told me, "Do not worry. I saved all my roofies for Dubai," or words very similar to that. I thought that he was joking and felt safe with my coworkers since we were all on the same team. I took two sips from the drink.

When I awoke the next morning, I was extremely sore between my legs and in my chest. I was groggy and confused. I went to the restroom, and while there, I realized that I had bruises between my legs and on my wrists. I was bleeding between my legs.

When I returned to my room, a man was lying in the bottom bunk of my bed. I asked him if he had sex with me and he said that he did. I asked if it had been protected, and he said no. I still felt the effects of the drug from the drink and was now very upset at the confirmation of my rape. I dressed and left for help.

I reported this incident to the operations coordinator who took me to the KBR clinic. The clinic then called KBR security who took me to the Army hospital. There, the Army doctor Jody Schulz performed a rape kit.

Dr. Schulz confirmed that I had been penetrated both vaginally and anally and that I was quite torn up down there. She indicated that based upon the physical damage to my genitalia that it was apparent that I had been raped. I watched her give my rape kit to the KBR security personnel as I was, again, turned over to these men.

KBR security took me to a container and imprisoned me. Two armed guards were stationed outside my door. I was placed inside and not allowed to leave. I asked for a phone to contact my father, and that was denied. I was not provided food or drink.

I begged one of the guards to let me use a phone until he finally shared his cell phone with me so that I could call my father back in Texas. My father then contacted my congressman, Ted Poe. Congressman Poe took actions to get me out of Iraq. That is when the State Department officials came to my rescue.

I was later interviewed by Halliburton supervisors, and it was made clear to me that I had essentially two choices: stay and get over it or go home with no guarantee of a job either in Iraq or back in Houston. Because of the severity of my injuries, I elected to go home, despite the obvious termination.

Once I returned home, I sought medical attention for both psychiatric and physical evaluations. I was diagnosed with post-traumatic stress disorder. Due to the pain in my chest, I went to several surgeons, and each discovered that my breasts were disfigured and my pectoral muscles had been torn. This injury required me to have reconstructive surgery.

I turned to the civil court for justice, in part because the criminal courts have failed to even file an indictment at this point.

Currently, there are approximately 180,000 military contractors in Iraq. Approximately 20,000 of those contractors are females. Fifty percent of all Americans on military bases in Iraq are contractors. Contractors have been immune from both Iraqi law and

the Uniform Code of Military Justice. There has not been a single complete prosecution of a criminal contractor to date.

When I decided to pursue a civil suit, I was informed that my bulky employment contract included an arbitration clause. I learned that I had signed away my rights to a public trial and justice. When there are no laws to protect Army contractors who are working abroad, what is to stop these people from taking the law into their own hands? The arena harbors a sense of lawlessness.

Victims of crime perpetrated by employees of taxpayer-funded government contractors in Iraq deserve the same standard of treatment and protection governed by the same laws, whether they are working in the U.S. or abroad. Army contracting corporations harbor and ignore criminal activities in Iraq, which, under the arbitration clause, protects them and does not hold corporate accountability when a crime has been committed.

My case was not an isolated incident. Since no actions of law could help other victims at this point, I started the Jamie Leigh Foundation. To date, 38 women have come forward through my foundation, and a number of them shared their tragedies in confidence because they were silenced by provisions of their arbitration agreements.

Unfortunately, arbitration is stacked in favor of business, making it harder for individuals to prevail in a dispute, and that is not just and fair to the patriotic, hardworking employees. How can this country not protect us contractors who have left our families to help our country in an effort to build democracy overseas when we are victimized criminally?

Originally, this was a controlled way to expedite resolution of disputes, but that is not the situation now, and it is imperative the system be revised. My goal is to ensure all American civilians who become victims of violent crimes while abroad have the right to justice before a judge and jury.

[The statement of Ms. Jones follows:]

Prepared Statement of Jamie Leigh Jones, Former Halliburton/KBR Employee

Good Afternoon, Mr. Chairman and members of the committee. First and foremost, I would like to thank all the members of congress who have united together in support of holding Army Contractors accountable under enforceable law.

I went to Camp Hope, located in the "Green Zone", Baghdad, Iraq on July 25, 2005, in support of Operation Iraqi Freedom. Halliburton/KBR, my employer, prior to leaving the U.S., promised me that I would live in a trailer equipped to house two women, with a shared bathroom.

Upon arrival at Camp Hope, I was assigned to a predominantly all-male barrack. According to documents provided by Halliburton/KBR in response to my EEOC complaint, approximately 25 women to more than 400 men were documented to be housed. I never saw a woman at the barrack. I did find myself subject to repeated "cat-calls" and men who were partially dressed in their underwear while I was walking to the restroom, on a separate floor from me. The EEOC credited my testimony with respect to this matter. That Determination Letter is attached to this statement as an Exhibit.

I complained about my living conditions to Halliburton/KBR management and asked to be moved into my promised living quarters. These repeated requests were denied.

On the fourth day in Iraq, I received a call on my cell phone. The reception in the barracks was bad, so I stepped outside to take the call. Afterwards, I noticed that the woman I was replacing (her contract had expired and she was returning back to U.S.) and several others were outside. They called me over and invited me to come and sit with them. When I did, I was offered a drink. The men (identified

only as Halliburton/KBR firefighters) told me that one of them could make a really good drink and so I accepted. When he handed it to me, he told me, "Don't worry, I saved all my Rufies for Dubai," or words very similar to that. I thought that he was joking, and felt safe with my co-workers. I was naive in that I believed that we were all on the same team. I took two sips or so from the drink.

When I awoke the next morning, I was extremely sore between my legs, and in my chest. I was groggy and confused, but did not know why at that time. I tried to go to the restroom, and while there I realized that I had many bruises between my legs and on my wrists. I was bleeding between my legs. At that point in time, I suspected I had been raped or violated in some way. When I returned to my room, a man was laying in the bottom bunk of my bed.

I asked him if he had sex with me, and he said that he did. I asked if it had been protected, and he said "no." I was still feeling the effects of the drug from the drink and was now very upset at the confirmation of my rape. I dressed and left for help.

I reported this incident to an Operations coordinator, who took me to the KBR clinic. The clinic then called KBR security, who took me to the Army CASH (Combat Army Support Hospital). There, the Army doctor, Jodi Schultz, M.D, performed a rape kit.

Dr. Schultz confirmed that I had been penetrated both vaginally and anally, and that I was "quite torn up down there." She indicated that based upon the physical damage to my genitalia, that it was apparent that I had been raped. Dr. Schultz took photographs, and administered a rape kit. I watched her give this rape kit to the KBR security personnel as I was again turned over to these men.

These men then took me to a trailer and then locked me in. Two armed guards (Ghurka's) were stationed outside my door. I was placed inside, and not allowed to leave. I had my cell phone, but it would not call outside of Baghdad. I asked for a phone to contact my father, and this was denied. I was not provided food or drink (although there was a sink, I did not trust it to drink from).

I begged and pleaded with one of the Ghurka guards until he was finally willing to share his cell phone with me so that I could call my father, back in Texas. I had begged him for that until he finally agreed. My father then contacted my Congressman, Ted Poe. Congressman Poe then took actions to get me out of the Iraq.

Once State Department officials (Matthew McCormick and Heidi McMichael) saved me from the container I was placed in a "safe" trailer, and I requested that Heidi stay with me. She did.

I was later interviewed by Halliburton/KBR supervisors, and it was made clear to me that I had essentially two choices: (1) "stay and get over it," or (2) go home with "no guarantee of a job," either in Iraq or back in Houston. Because of the severity of my injuries, I elected to go home, despite the obvious threat of termination.

Once I returned home, I sought medical attention for both psychiatric and physical evaluation. I was diagnosed with Post Traumatic Stress Disorder (PTSD).

I also saw Sabrina Lahiri M.D., who found that my breasts were asymmetrically disfigured, and that my pectoral muscles had been torn. She wanted to do reconstructive surgery, and I sought "second opinions" from several surgeons regarding that surgery. Even the doctor, Halliburton forced me to see, reviewed my injuries and agreed that they were due to forced trauma. He expressed anger and disgust. Dr. Ciaravino then performed the first reconstructive surgery.

I still require additional medical treatment, including another reconstructive surgery, and I continue to go to counseling 3 times per week.

I turned to the civil court for justice, in part, because the criminal courts have failed to even file an indictment at this point. Currently there are approximately 180,000 military contractors in Iraq. Approximately 20,000 of those contractors are females. 50% of Americans on military bases in Iraq are contractors. Contractors have been immune from both Iraqi law and the Uniformed Code of Military Justice therefore there is no law governing them. There has not been a single complete prosecution of a criminal contractor to date.

When I decided to pursue a civil suit, I was informed that within my thirteen-page employment contract that had an additional five pages attached, included an arbitration clause. At this point in my life I had no idea what an arbitration was other than a tiny paragraph included in the lengthy document that mandated that I could not get justice from the civil court system. I learned that I had signed away my right to a trial by jury. I thought this right was guaranteed by the seventh amendment to the United States Constitution that specifically states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved". When there are no laws to protect army contractors who are working abroad (from violent crimes), what is to stop people from taking the law into their own hands? The arena harbors a sense of lawlessness. The

forced arbitration clause in army contractor's contracts, prove to protect the criminals of violent crimes, rather than enforce they be held accountable by a judge and jury.

Victims of crime perpetrated by employees of taxpayer-funded government contracts in Iraq deserve the same standard of treatment and protection governed by the same laws whether they are working in the U.S. or abroad.

Army contracting corporations harbor and ignore criminal activities in Iraq, which under the arbitration clause agreement, protects them and does not hold corporate accountability when a crime has been committed. This clause also paves the way for corporations to not be held accountable under criminal law. My case wasn't an isolated incident. Since no actions of law could help other victims at this point, I started "The Jamie Leigh Foundation" *www.jamiesfoundation.org.* To date, thirty-eight women have come foreword through my foundation. A number of them shared their tragedies in confidence because they were silenced by provisions of their arbitration agreements.

The arbitration proceeding is private and discrete and the outcome of arbitration cannot be disclosed to the public. Unfortunately, arbitration is stacked in favor of businesses, making it harder for individuals to prevail in a dispute and that is not just, and unfair to the patriotic hard-working employees. How can this Country not protect us contractors, who have left our families to help our country in an effort to build democracy overseas, when we are victimized criminally? Originally, this was a controlled way to expedite resolution of disputes but that's not the situation now and it is imperative the system be revised. My goal is to ensure all American civilians who become victim of violent crimes while abroad, have the right to justice before a judge and jury.

Chairman ANDREWS. Well, Ms. Jones, thank you. Because this hearing is being made available around the country and around the world on the Internet, a lot of people are going to get to hear the story you just told.

Mr. JONES. Right.

Chairman ANDREWS. I deeply regret that you had to tell it, but I think we all respect and admire your courage and integrity for telling it. So thank you very, very much.

Mr. JONES. Thank you.

Chairman ANDREWS. And we will get to questions at the end of the panel.

Mr. Poe, I just wanted to invite you, if you would like to, to come join the dais. You are welcome. But we do have another witness that we are going to ask to assume the seat that you are in. You are certainly welcome to stay and join us on the dais, should you choose to do so.

Mr. POE. Thank you, Mr. Chairman.

Chairman ANDREWS. Okay.

I would ask if Mr. de Bernardo could come forward and take that seat.

And, Mr. de Bernardo, we are going to ask you to be next in line to testify, if you would not mind.

Mr. DE BERNARDO. Thank you.

Chairman ANDREWS. Mark de Bernardo is a partner with the law firm of Jackson Lewis, a labor and employment firm. In the past, Mr. de Bernardo has served as special counsel for domestic policy and director of labor law for the U.S. Chamber of Commerce. He received his BA from Marquette University in 1976 and his JD from the Georgetown University Law Center in 1979.

Mr. de Bernardo, welcome. Your testimony has been included as a part of the record, your written testimony, and we would now give you 5 minutes to summarize it orally. Welcome.

STATEMENT OF MARK DE BERNARDO, PARTNER, JACKSON LEWIS, LLP

Mr. DE BERNARDO. Thank you, Chairman Andrews, Ranking Minority Member Kline, members of the subcommittee.

I appreciate this opportunity to testify in strong support of the use of ADR, Alternative Dispute Resolution, and the use of mediation and arbitration generally in employment as effective alternatives to litigation and in opposition to Subtitle C, the arbitration prohibition section of the H.R. 5129.

I am executive director and president of the Council for Employment Law Equity. I am also senior partner and chair of the ADR practice group at Jackson Lewis. Jackson Lewis is an employment law firm of more than 450 lawyers in 34 cities, and I appreciate this opportunity to be before you today.

Jackson Lewis has long been a strong supporter of effective and equitable ADR programs as an alternative to costly, time-consuming, deleterious, relationship-destructive litigation. I strongly believe that if you want justice in American today, go to arbitration. Arbitrators are more predictably balanced, unbiased, fair, and neutral than our politically appointed judges and randomly-selected juries in our litigation system.

ADR employment programs are flourishing, and when implemented appropriately, are decisively both pro-employee and pro-employer. Like the AFL-CIO and organized labor in general, my law firm has highly supported ADR and its impacts of less litigation and less legal fees because it is what is best for many of our clients and for their employees and because it is the right thing to do.

The seminal question is: Should employers and employees be able to engage in mediation and mandatory binding arbitration of employment disputes as an alternative to litigation? The seminal answer is: Absolutely. ADR employment programs, when implemented appropriately, as mentioned, are decisively in employees' best interests.

In my testimony, I discuss this. There are plenty of studies, statistics. Overall, the research is very, very much in favor of the use of ADR. The use of ADR in employment is common. It is increasing. It is a means of avoiding litigation, addressing more employee issues, resolving more amicably these concerns.

Given the cost, delays, and divisiveness of employment litigation in America today, a more sensible and conciliatory approach is preferable for employees and for employers. The net result of ADR is more employee complaints are received and resolved—many more.

Secondly, employee complaints are resolved sooner with less tension.

Third, there is less turnover. There is no question that employment litigation is an employment relationship destroyer whereas arbitration is an employment relationship preserver. So there is less turnover, less likely and more favorable preservation of employee relationships.

Fourth of the sixth, improve morale. Employers are better employers because they identify more problems in the workplace and address them at an earlier stage.

Number five, more effective communication and enhanced constructive input by the employees into their companies.

And, finally, better workplaces. Employers are better employers as a result of arbitration.

If there are reforms which are necessary and appropriate, certainly they should be considered, and the CEOE and Jackson Lewis would support and welcome such reforms. What is not needed is a wholesale and retroactive dismantling of common, effective, and widespread ADR and employment programs that work and work well. The cost to employees and employers and the interest of justice and sound employee relations would be enormous and extremely destructive.

I would also like to point out that 70 percent of those individuals who participated in mandatory binding arbitration say that they support it and would do it again. Eighty-three percent of the public in a public opinion poll, as discussed in my testimony, favor binding arbitration, and 86.2 percent of lawyers who have practiced in this area, both plaintiffs' lawyers and defense lawyers also support it.

I dare say that most any legislator would accept approval ratings of 70 percent, 83 percent, and 86.2 percent. There is overwhelming support for ADR by those who are most involved and those who practice in this area.

The supporters of ADR include the judiciary, the federal government. It is very, very common in federal government. Many, many agencies and branches of the armed services use binding arbitration as part of their practice.

Practicing lawyers, as I mentioned, favor it, 86.2 percent. Employees favor it. A public opinion poll found 83 percent of employees favor arbitration. Parties to arbitration favor it. A survey of more than 600 adults who participated in binding arbitration, 70 percent of——

Chairman ANDREWS. Excuse me, Mr. de Bernardo. If you could just wrap up. The red light is on.

Mr. DE BERNARDO. Okay. So, with that, I cannot help but take one quote from my conclusion, which is, "When will mankind be convinced and agree to settle the difficulties by arbitration?" That quote was issued by Ben Franklin more than 200 years ago. I agree with him.

It is a very big part of American society right now. There would be very draconian consequences if Subtitle C were enacted.

Thank you.

[The statement of Mr. de Bernardo may be accessed at the committee website's following address:]

http://edlabor.house.gov/testimony/2008-02-12-MarkdeBernardo.pdf

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Chairman ANDREWS. Thank you, Mr. de Bernardo. We appreciate you being here.

Mr. Foreman?

STATEMENT OF MICHAEL FOREMAN, CO-CHAIR OF EMPLOYMENT DISCRIMINATION TASK FORCE, LEADERSHIP COUNCIL ON CIVIL RIGHTS

Mr. FOREMAN. Chairman Andrews, Ranking Member Kline, members of the committee, thank you for taking up this important issue.

My name, again, is Michael Foreman. I am here testifying on behalf of the Leadership Conference on Civil Rights, which is a coalition of over 200 national organizations that is dedicated to providing equal opportunity to all members of our society.

Given the fact that this committee is taking up this issue, it is obvious that you understand the importance of this issue, but I do not want to put too small a point on that.

In 1979, about 1 percent of employers in this country had predispute—and I do want to focus on pre-dispute—binding arbitration clauses for employment. In 2007, that figure had moved to 25 percent. If that trend continues, which my colleague here indicated it will, in the very foreseeable future, we are going to see a legal system where civil right employment disputes are not going to be decided by judges who are publicly appointed or by juries of our peers, which is the bedrock of our society, but they are going to be decided by a small group of arbitrators, largely paid by employers, in confidential settlements with no public accountability.

The current issue before this committee—and I want to stress this—is not whether there should be binding arbitration in employment disputes. We support binding arbitration of employment disputes, when it is voluntary, when it is knowing, and when there is, in fact, a dispute to be arbitrated.

What we do not support is pre-dispute binding arbitration that are hidden in applications, that are hidden in employee handbooks, or forced on to employees, and that is the reason we support the provision in H.R. 5129.

The sad reality for many of the millions of clients that our organizations represent is there really is no choice. There is no choice in what they can do. In making good social policy, we cannot divorce ourselves from reality.

Do any of us really, really believe that most blue-collar workers, if they walk in and refuse to sign the application because it has a binding arbitration clause, that they will get that job? Or in Ms. Jones's case, do any of us really believe if she had told Halliburton, "I am sorry. I cannot sign that agreement," that she would have gotten the job?

Our workers' choices are between putting food on the table or possibly getting health insurance or possibly being able to pay their mortgage. That is not a real choice, and that is all this bill is attempting to do in this provision. The provision is to provide that choice.

In practice, mandatory arbitration agreements are not supposed to change substantive rights. They are only supposed to change the forum in which they are doing it. But that is also sadly not true. In the detailed statement, we have addressed that. It is not insignificant to take away the right to be heard in court or the right to be heard by a jury.

In some of the statistics we have provided that are provided by the American Arbitration Association, for arbitration dealing with Pfizer for a specific time period, the decision rate was a 97 percent win rate for the employer. For Halliburton, it was an 82 percent. They prefer arbitration because they win in arbitration most of the time.

It is one thing to permit employees to willingly give that up. It is another thing to take that choice away before there is even a dispute to be taken away.

I do not need to spend a lot of time talking about this in the abstract. You just heard testimony from Ms. Jones about probably one of the ugliest employment situations that you can imagine, but let's think about the consequences when she returned from helping serve our country, and that ugliness is revisited by the fact that she cannot have the right that this Congress has provided to her exercised in a court of law or before a jury. What type of ugliness is that? And that is something that we want to correct.

The Supreme Court has virtually invited Congress repeatedly, through the Waffle House, through the Gilmore decision, and others, to specifically tell them, "If you do not want these subject to pre-dispute arbitration, then tell us so."

In fact, what we are asking you to do is accept that invitation. We are not asking to ban binding arbitration across the board, but what we are asking you to do is ban it in a pre-dispute and then only if it is willing.

And I will be available to answer questions and provide any other information.

Thank you.

[The statement of Mr. Foreman follows:]

Prepared Statement of Michael Foreman, on Behalf of the Leadership Conference on Civil Rights

Chairman Andrews, Ranking Member Kline and members of the Subcommittee. Thank you for convening this hearing, which in part will address the issue of mandatory arbitration of employment disputes and, ultimately, how much we as a society value the civil rights of our workers. Pre-dispute mandatory arbitration is an issue that that is not only timely, but critical as we, as a nation, continue to struggle to ensure equal employment opportunities for all. My name is Michael Foreman and I am testifying today on behalf of the Leadership Conference on Civil Rights (LCCR). The Leadership Conference on Civil Rights ("LCCR") is a coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States.[1] Founded in 1950, LCCR is the nation's oldest, largest, and most diverse civil and human rights coalition. LCCR's members are dedicated to preserving the interest of individuals in raising issues of unlawful discrimination and the interest of society in having those issues brought to light. Collectively, LCCR's members represent millions of our nation's most vulnerable workers.

In addition to serving as the Co-Chair of the Leadership Conference's Employment Task Force, I am also the Director of the Employment Discrimination Project at the Lawyers' Committee for Civil Rights Under Law, which is one of LCCR's member organizations. The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to insure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. The Lawyers' Committee seeks to ensure that the goal of civil rights legislation, to eradicate discrimination, is fully realized.

During the course of my career, I have represented employees and employers, as well as federal, state, and local governments. I have handled employment matters

through all phases of their processing from the administrative filing, at trial and through appeal.[2] This hands-on experience informs my analysis of the use of mandatory arbitration for employment disputes.

My testimony will address three topics: (1) the involuntary nature of many pre-dispute arbitration agreements (2) the ways in which mandatory arbitration clauses subvert employees' substantive rights, and (3) why it is necessary to curtail the use of pre-dispute mandatory arbitration.

It is important to recognize at the outset that pre-dispute mandatory arbitration is not just an employment issue or a civil rights issue; it is an issue that cuts to the core of this country's ideals of equality and due process.

For over half of a century, our society and this Congress has struggled with issues concerning equal employment opportunity and attacked the problem of employment discrimination through significant legislation including Title VII, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act, to name a few. In keeping with our national commitment to equality, Congress created a framework for enforcing these rights though individual lawsuits, litigation by the Attorney General, and the efforts of federal agencies, like the Equal Employment Opportunity Commission, tasked with enforcing laws against employment discrimination. In doing so, Congress established a plan for combating discrimination through an open, fair process governed by the rule of law and administered by impartial judges and juries that allowed for public accountability. In fact, as recently as 1991, Congress acted to protect employees by codifying their right to a jury trial in Title VII cases. It is hard to envision a justice system that allows employers to strip employees of the very rights Congress has worked tirelessly to protect, especially through pre-dispute mandatory arbitration clauses hidden in employment applications or employee handbooks.

While one can debate whether permitting binding arbitration for any civil rights claim is good public policy, we are not here to resolve that issue. The current question before this subcommittee is not whether there can be binding arbitration but when binding arbitration is appropriate. We support alternative dispute resolution agreements, including binding arbitration agreements, that are adopted knowingly and voluntarily after a dispute has emerged. What we oppose, and what Section 421-424 of H.R. 5129 (Civil Rights Act of 2008) prohibits, are binding mandatory arbitration clauses that employees are forced to submit to long before any dispute has arisen.

Many Employees Have No Choice In Whether To Submit Their Civil Rights Claims To Pre-Dispute Mandatory Arbitration

Seeing a way to minimize the costs associated with violating civil rights laws, employers are increasingly turning to pre-dispute mandatory arbitration. In 1979, only 1 percent of employers used arbitration for employment disputes.[3] According to most recent estimates, around 15% to 25% of employers nationally have adopted mandatory employment arbitration procedures.[4] The stark reality is that all too often, the employees have no choice but to surrender their rights and accept mandatory arbitration. Many employees do not have the luxury of choosing when, and under what conditions to sign arbitration agreements, because employers often make such agreements a job requirement. Employees who refuse to sign a mandatory arbitration agreement could lose their current jobs or be denied a new position.

In formulating good public policy we must not divorce ourselves from the reality of life for many Americans; if a blue-collar worker refuses to sign a job application containing a pre-dispute mandatory arbitration clause, or a separate arbitration agreement included in a stack of documents piled before them on their first day of the job, do you honestly think the employee would get the job?[5] We all know what would happen, the employer would just go on to the next applicant who signed the arbitration agreement, regardless of whether that worker knew he or she was agreeing to submit his or her civil rights claims to mandatory arbitration or what that really meant.

For many employees, the only real choices they face are ones like:

- Passing up a paycheck that would help put food on the table or signing a job application stating that one's signature constitutes an agreement to binding arbitration of any dispute;
- Risking foreclosure from unpaid mortgage bills or agreeing to submit their supposedly federally guaranteed civil rights to mandatory arbitration; or
- Giving up the chance to finally get health care benefits or signing away their right to a jury trial

These employees do not really have a choice at all.

Employees also have no way of knowing when a provision of an arbitration agreement is actually prohibited by law. Most often, employees will simply submit to the

terms of the contract without realizing that they could challenge the legality of certain unfair or impermissible conditions.

Having had no choice but to accept mandatory arbitration, many employees are stuck trying to enforce their federally protected civil rights in a system selected and dominated by their employer. These are the workers the Leadership Conference and the Lawyers' Committee represent. It is their ability to choose that Section 421-424 of H.R. 5129 is designed to protect.

In Practice, Pre-Dispute Mandatory Arbitration Agreements Supplant Employees' Substantive Rights

While the Supreme Court has noted that mandatory arbitration agreements should only alter the forum in which employment disputes are resolved, not the substance of employees' civil rights, this distinction is not borne out in practice. In reality, by stripping away procedural rights, the underlying substantive right is undermined or even eviscerated. Mandatory arbitration agreements often lack the safeguards, accountability, and impartiality of the system Congress created, allowing employers to bypass some of the most important protections built into anti-discrimination legislation such as the Civil Rights Act of 1964 and the Civil Rights Act of 1991.

One of the most glaring ways in which mandatory arbitration agreements strip employees of their substantive rights is by denying them their day in court before an impartial judge and a jury of their peers. Mandatory arbitration forces employees to forego the traditional court system and present their claims before arbitrators who are not required to know or follow established civil rights and employment law. Private arbitrators, who are selected by the employer, also depend on the employer for repeat business, and thus have an incentive to rule in favor of the employer. In fact, despite the clear conflict of interest that arises, employers sometimes finance the arbitration. In such cases, the arbitrator may feel obliged to rule in favor of the party that is paying the bill.

Tellingly, by way of examples, between January 1, 2003 and March 31, 2007, AAA's public records show that AAA held 62 arbitrations for Pfizer, of which 29 reached a decision. Of these 29 cases, the arbitrator found for the employer 28 times—a decision rate of 97 percent for the employer. Similarly, Halliburton's win rate was 32 out of 39 cases that went to decision—an 82 percent win rate for the employer.[6]

Employees' rights are diminished by mandatory arbitration in many ways, including but not limited to:

- Limitation or prohibition of pre-trial discovery, thus impeding employees' ability to use depositions and discovery requests to obtain information that would support their claims. As the employee has the burden of proof, this limitation is particularly troublesome. This lack of discovery benefits the party with greater access to evidence and witnesses. Since employers generally have control over relevant documents and the employees involved, arbitration's limited discovery provides a distinct advantage to employers.
- No right to trial before a jury of one's peers, which is protected by legislation such as the Civil Rights Act of 1991 and the Age Discrimination in Employment Act.
- Stringent filing requirements, giving parties less time to prepare and reducing the statutory limitations period that would otherwise be available for filing a lawsuit.
- Limited right to appeal arbitration decisions. Courts are only permitted to overturn such decisions under extreme circumstances. Significantly, the existence of clear errors of law or fact in an arbitrator's decision does not provide grounds for appeal.
- Limited range of remedies available. Arbitrators cannot order injunctive relief, and very rarely award compensatory or punitive damages. Even when awarding damages, arbitrators often award only back pay.
- Uncertain ability to bring class actions suits, even when this particular type of action would be most efficient in addressing the discrimination.

Arbitration is also often private and confidential, so employers are spared from the public awareness that otherwise would provide a strong incentive to proactively address discrimination and harassment.

Pre-dispute mandatory arbitration is simply not an effective way to enforce our civil rights laws, hold violators accountable, and prevent discrimination from occurring again in the future. To the contrary, allowing arbitrators to bypass important civil rights legislation in making their decisions weakens our system's ability to protect employees from discrimination in the workplace. It is one thing to permit employees to willingly and knowingly agree to resolve an existing dispute through arbitration. It is quite another to allow vulnerable employees to be forced by their cir-

cumstances to rely on mandatory arbitration to enforce their civil rights and maintain our nation's commitment to equality.

Why the Arbitration Provision in H.R. 5129 is Necessary

Primarily because of a competing public policy favoring arbitration of disputes evident in the Federal Arbitration Act, the Supreme Court in its recent analysis of predispute mandatory arbitration,[7] has been unwilling to conclude that mandatory arbitration frustrates the purpose of civil rights laws ensuring equal employment opportunity, absent an explicit statement from Congress on the issue. Further, as previously mentioned, the Court has repeatedly noted that binding arbitration should not impact the substantive right, just the forum.

These rulings have exacerbated rather than resolved the problems raised by mandatory arbitration agreements. Many lower courts give deference to arbitration agreements in virtually every type of employment case and ignore the fact that mandatory arbitration has a substantial impact beyond merely changing the forum.

Indeed, some courts have enforced mandatory arbitration agreements even when employees have expressly refused to sign them. Ms. Fonza Luke, of Alabama, worked loyally as a nurse for a hospital for almost 30 years. Despite her decades of committed service, she was asked to sign a document agreeing to use of mandatory arbitration program for any dispute arising in her workplace. Although she explicitly refused to sign the agreement, a court forced her arbitrate her discrimination claims.[8]

Judicial decisions upholding mandatory arbitration in employment cases highlight the importance of Congress resolving the issue through legislation like Section 421-424 of H.R. 5129. In light of Congress's approval of arbitration generally, as reflected in the Federal Arbitration Act, courts are understandably uncomfortable concluding that arbitration of employment discrimination claims is unlawful without more evidence of congressional intent.[9] Speculation regarding Congress's intent regarding mandatory arbitration of employment claims has created substantial confusion in the lower courts. Some courts have enforced mandatory arbitration clauses and upheld them as binding.[10] Others have struck them down, concluding that such clauses significantly alter employees' substantive rights.[11]

Conclusion: Congress Must Take Positive Action

Through its decisions, the Supreme Court has virtually invited Congress to specifically express its intent with regard to the permissibility of pre-dispute mandatory arbitration of employment claims.[12] Section 421-424 of H.R. 5129 answers the Court's request by reinforcing the protections Congress intended our nation's workers to enjoy.

The Leadership Conference urges Congress support the H.R. 5129's arbitration provision. With nearly a quarter of America's non-union workforce currently being subjected to the separate and extremely unequal system of mandatory arbitration, Congress should take positive steps to ensure that our civil rights and employment laws protect all American workers.

Again, thank you Chairman Andrews, Ranking Member Kline, and members of the Subcommittee for the opportunity to speak with you today.

ENDNOTES

[1] A listing of the organizations that comprise the Leadership Conference is attached as Exhibit 1.

[2] A copy of my resume is attached as Exhibit 2.

[3] See the attached timeline documenting the increase in the use of mandatory arbitration prepared by the National Employment Lawyers Association, attached as Exhibit 3.

[4] See Alexander Colvin Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury? 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) Describing it as a conservative estimate, Professor Colvin extrapolates the 25% figure from his 2003 finding that 23% of the non-union telecommunications workforce was covered by mandatory arbitration programs.

[5] This assumes that the applicant is actually aware of the pre-dispute mandatory arbitration requirement. Even if some employees would object to unfair and burdensome pre-dispute mandatory arbitration clauses, such clauses are often deeply buried in the small print of lengthy employment contracts, and can be so unclear that most employees do not truly understand the consequences of signing the agreement.

[6] See Hearing on H.R.. 3010, The Arbitration Fairness Act of 2007Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. (2007) (Testimony of Ms. Cathy Ventrell-Monsees, Esq.).

[7] See EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (concluding that a mandatory arbitration agreement between an employee and an employer does not bar the EEOC from pursuing victim-specific relief in an enforcement action under the Americans with Disabilities Act); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (holding that the Federal Arbitration Act exempts only transportation workers, not all employment contracts, and therefore the binding arbitration provision contained an a retail employee's job application was enforceable); Gilmer

v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing a pre-dispute, binding, mandatory arbitration agreement in an age discrimination case, even though the Age Discrimination in Employment Act explicitly codifies the right to a trial before a judge and jury).

[8] See S. 1782, The Arbitration Fairness Act of 2007: Hearing on S. 1742 Before the S. Comm. on the Judiciary, 110th Cong. (2007) (Testimony of Ms. Fonza Luke).

[9] See Circuit City, 532 U.S. at 119 (Concluding that the FAA's text cannot be interpreted to exempt all employment contracts and Court cannot simply create such an exemption); Barker v. Halliburton Co., 2008 U.S. Dist. LEXIS 6741 at *21 (S.D. Tex. 2008) ("Therefore, absent some showing that Congress expressly exempted one of Barker's types of claims from arbitration, the presumption under the Federal Arbitration Act is that arbitration must be compelled.").

[10] See, e.g., EEOC v. Woodmen of the World Life Ins. Society, 479 F.3d 561 (8th Cir. 2007); Garrett v. Circuit City Stores, Inc., 449 F.3d 672 (5th Cir. 2006); Caley v. Gulf Stream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005). In fact, the only circuit that has addressed the issue of mandatory arbitration of USERRA claims has enforced the arbitration agreement despite explicit language in USERRA indicating that it supersedes any contract or agreement that reduces, limits, or eliminates any rights under the Act or creates additional prerequisites to exercising USERRA rights. See Garrett, 449 F.3d at 677-678; 38 U.S.C. § 4302(b).

[11] See, e.g., Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007) (holding that a mandatory arbitration agreement was unconscionable under California law in part because it contained provisions that required employees to "waive potential recovery for substantive statutory rights in an arbitral forum"); Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006) (striking down several provisions of a pre-dispute mandatory arbitration clause as invalid because threatened to alter substantive rights); McMullen v. Meijer Inc., 355 F.3d 485 (6th Cir. 2004) (striking down a provision in a mandatory arbitration agreement which granted employer unilateral control over the pool of potential arbitrators, because such a provision inherently lacked neutrality and prevented the employee from effectively vindicating her statutory rights).

[12] See Circuit City Stores, Inc. v. Saint Clair Adams, 532 U.S. 105, 119 (2001) (explaining that the Court has no basis to adopt "by judicial decision rather than amendatory legislation, an expansive construction of the FAA's exclusion provision" that would exempt all employment contracts) (internal citations omitted) (emphasis added); Gilmer, 500 U.S. at 26 ("Although all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.").

Chairman ANDREWS. Mr. Foreman, thank you for your testimony.

We will now move to the witnesses who will discuss the issue of the employment rights of first responders who serve our country in a voluntary, but professional basis.

Chief Alchevsky, welcome to the committee.

STATEMENT OF JOHN ALCHEVSKY, VOLUNTEER FIREFIGHTER

Mr. ALCHEVSKY. Thank you, Chairman Andrews, Ranking Member Kline, distinguished members of the subcommittee.

I would like to thank you for giving me the opportunity to be here today to speak with you about the need for employment protection for volunteer firefighters and EMS personnel.

My name is John Alchevsky. I am the chief of Cassville Volunteer Fire Company in Jackson Township, New Jersey, where I have served for almost 30 years.

In 2005, immediately following Hurricane Katrina, my fire company was contacted by FEMA and asked to contribute two teams of four to be deployed to Louisiana to perform community relations duties.

I am employed as a captain with the New Jersey Department of Corrections. When I approached my employer about potentially deploying, I was informed that I did not have enough personal leave time accrued to go.

My job has prevented me from responding to major emergencies within the State of New Jersey on a number of occasions as well. For instance, last summer, my company was dispatched to Stafford Township, in Southern Ocean County, where a wild land fire was burning for structure protection duty.

While I was eventually able to deploy, along with the rest of my company, having to go through the normal process of requesting and receiving time off from work delayed my response by approximately 24 hours. These are just two examples of instances in which my job has prevented me from responding to an emergency.

Over the course of 30 years of volunteer service, I have personally experienced and witnessed numerous situations in which volunteer firefighters have either been prevented from or delayed in responding to an emergency or have had to leave the scene of an emergency prematurely for fear of disciplinary action by their employer.

In New Jersey, municipal employees that are members of a volunteer fire company or first aid squad are allowed time off with pay to respond to local emergencies. Additionally, civil servants employed by the state are authorized to respond to state or federally declared disasters to serve as certified Red Cross volunteers.

This protection does not extend to volunteer firefighters, EMS, or emergency management personnel. Unfortunately, there is no job protection of any kind for volunteers who are employed in the private sector.

From my perspective, the issue of job protection is a fundamental one for the long-term health of the volunteer fire service. Recruitment and retention of volunteer personal is becoming increasingly difficult. Many people do not seem to have enough free time to volunteer anymore, particularly as training requirements increase.

In the past when people lived and worked in the same town, volunteering was easier and employers were also community members. In many parts of New Jersey, though, people are moving from Philadelphia and New York into formerly rural areas and commuting back into the city for work. As the distance between home and employment increases and grows, people are finding it more difficult to balance their responsibilities as employees and volunteer emergency responders.

The passage of legislation protecting the employment status of volunteer emergency responders would help to counteract this trend.

I wish to thank you, again, for the opportunity to testify before you here today. I look forward to answering any questions that you might have.

[The statement of Mr. Alchevsky follows:]

Prepared Statement of John I. Alchevsky, National Volunteer Fire Council

Chairman Andrews, Ranking Member Kline and distinguished members of the subcommittee, I'd like to thank you for giving me the opportunity to be here today to speak with you about the need for employment protection for volunteer firefighters and EMS personnel. My name is John Alchevsky and I am the Chief of Cassville Volunteer Fire Company #1 in Jackson Township, New Jersey, where I have served for almost 30 years.

In 2005, immediately following Hurricane Katrina, my Fire Company was contacted by FEMA and asked to contribute two teams of four to be deployed to Louisiana to perform community relations duties. I am employed as a Captain with the New Jersey Department of Corrections. When I approached my employer about potentially deploying, I was informed that I did not have enough personal leave time accrued to go.

My job has prevented me from responding to major emergencies within the state of New Jersey on a number of occasions. For instance, last summer my company was dispatched to Stafford Township in Southern Ocean County, where a wildland

fire was burning, for structure protection duty. While I was eventually able to deploy along with the rest of my company, having to go through the formal process of requesting and receiving time off from work delayed my response by 24 hours.

These are just two examples of instances in which my job has prevented me from responding to an emergency. Over the course of 30 years of volunteer service, I have personally experienced and witnessed situations in which volunteer firefighters have either been prevented from or delayed in responding to an emergency or had to leave the scene of an emergency prematurely for fear of disciplinary action by their employer.

In New Jersey, municipal employees that are members of a volunteer fire company or first aid squad are allowed time off with pay to respond to local emergencies. Additionally, civil servants employed by the state are authorized to respond to state- or federally-declared disasters to serve as certified Red Cross volunteers. This protection does not extend to volunteer firefighters, EMS or emergency management personnel. Unfortunately, there is no job protection of any kind for volunteers who are employed in the private sector.

From my perspective, the issue of job protection is a fundamental one for the long-term health of the volunteer fire service. Recruitment and retention of volunteer personnel is becoming increasingly difficult. Many people don't seem to have enough free time to volunteer anymore, particularly as training requirements increase. In the past, when people lived and worked in the same town, volunteering was easier and employers were also community members. In many parts of New Jersey, people are moving from Philadelphia and New York into formerly rural areas and commuting back into the city for work. As the distance between home and employment grows, people are finding it more difficult to balance their responsibilities as employees and volunteer emergency responders. Passage of legislation protecting the employment status of volunteer emergency responders would help to counteract this trend.

Thank you again for the opportunity to testify here today. I look forward to answering any questions that you might have.

Chairman ANDREWS. Chief, thank you. We are very glad that you are with us. We appreciate it.

Mr. Robinson, welcome to the subcommittee.

STATEMENT OF ALFRED ROBINSON, JR., SHAREHOLDER, OGLETREE DEAKINS

Mr. ROBINSON. Thank you, Mr. Chairman.

Chairman Andrews, Ranking Member Kline, and distinguished members of the subcommittee, thank you for this opportunity.

Again, my name is Al Robinson. I appear today on behalf of the Society for Human Resource Management, the world's largest professional association devoted to human resource management.

Mr. Chairman, over the last several years, the nation's volunteer firefighters and emergency medical service personnel have been asked to respond to everything from natural disasters, such as the recent tornadoes in the Southeast and the fires in California last summer, to the terrorist attacks of September 11, 2001.

The Society of Human Resource Management joins all Americans in expressing our indebtedness to the service of volunteer firefighters and medical responders.

U.S. employers provide a host of leave benefits, both voluntary and mandatory, to help employees achieve an effective work-life balance and meet their own professional and personal needs. I want to highlight for the subcommittee a few of those federal laws.

The most prominent federal law is the Family and Medical Leave Act. Another statute, the Americans with Disabilities Act, also provides leave benefits. Through providing reasonable accommodations to employees, employers frequently give time off from work to these employees. Also, EEOC guidance says that employers can be re-

quired to give an indefinite leave of absence to employees in certain circumstances.

The newest federal leave mandate is a job-protected leave benefit for military family members. It requires employers to provide both active duty leave and 12 weeks of FMLA leave for an employee whose spouse, son, daughter, or parent is called to active duty and caregiver leave for a total of 26 weeks during a 12-month period to give care for recovering soldiers.

I underscore these laws because employers face potential litigation and damages when they make a wrong decision.

As for the proposed legislation, it is a laudable goal to give a leave entitlement for volunteer firefighters and emergency medical personnel. However, this proposal has many provisions that could undermine that goal, and we believe the subcommittee should clarify and address them.

Despite the best intentions of the drafters of this legislation, there are significant omissions in this legislative proposal.

First, the proposal charges no governmental department or entity with the responsibility to define by regulation any provision of the proposal. Regulatory guidance would assist employees and employers to know and understand their rights and obligations.

The second omission is the proposal provides no administrative enforcement mechanisms. Instead, the only way to resolve ambiguities or unaddressed questions under this leave program is through unnecessary, costly ligation, which we submit will not nurture the spirit of volunteerism.

In addition, there is a need for clarification. First, the proposal makes no differentiation in the characteristics of the employer to which it applies. The proposal would apparently apply to any and all employers, large or small.

Second, it is unclear if the legislation would cover full-or part-time employees.

Third, the proposal fails to take into consideration its impact upon any employer if an employee is a key employee.

Fourth, there is no provision for undue hardship limitation should a single employer face the burden of having multiple employees who are absent due to its protections.

Fifth, the proposal does not address whether reasonable notice means that an employee must comply with the employer's notification procedures. As you are aware, this is an ongoing issue for employers and employees under the FMLA.

Sixth, the inclusion of state disasters and emergencies under the proposal compounds an employee's and employer's ability to determine what disasters or emergencies are covered.

Seventh, I would urge the subcommittee to address language to allow an employer to reduce an employee's pay when they are absent for working for volunteer services. At a minimum, Congress should clarify that an employer could dock a Section 13(a)1 exempt employee under the Fair Labor Standards Act for a partial day absence and that a full day absence for volunteering would constitute a personal day.

Eighth, the verification process needs clarification. While it permits an employer to require an employee to provide it, no timeframes as to compliance or consequences for failure are provided.

Ninth, the proposal provides 14 days of leave, but is unclear whether tardiness or absence would be protected after being deployed for a week.

There are other ambiguous provisions and other questions.

I would be glad to any questions for you, Mr. Chairman and the subcommittee, and we appreciate this opportunity to share our concerns.

[The statement of Mr. Robinson follows:]

Alfred B. Robinson Jr.
Ogletree Deakins Nash Smoak & Stewart PC

On behalf of the
Society for Human Resource Management

Testimony before the U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Health, Employment, Labor, and Pensions hearing
February 12, 2008

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Introduction

Chairman Andrews, Ranking Member Kline, distinguished members of the Subcommittee, my name is Alfred B. Robinson, Jr. and I am a shareholder with Ogletree Deakins Nash Smoak & Stewart PC in Washington, D.C. I greatly appreciate the Subcommittee's invitation to testify today.

As background, I am a former acting Administrator of the United States Department of Labor (DOL) Wage and Hour Division, the federal agency that administers and enforces a variety of labor standards statutes, including at least two statutes relevant to today's hearing: the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). Prior to becoming acting Administrator, I was Deputy Administrator for Policy and as Senior Policy Advisor of the Wage and Hour Division. Before joining DOL, I was a member of the South Carolina House of Representatives from 1992 until 2002.

I appear today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. SHRM is the world's largest professional association devoted to human resource management. The Society's mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India. The Society's membership comprises HR professionals who are responsible for administering their employers' leave policies, including paid and unpaid time-off programs and FMLA leave.

Employer Support for Volunteer Emergency Services Personnel

Mr. Chairman, over the last several years, the nation's volunteer firefighters and emergency medical services personnel have been asked to respond to everything from natural disasters, such as the tornadoes in Arkansas and Tennessee last week and the fires in California last summer, to the terrorist attacks of September 11, 2001. The Society for Human Resource Management joins all Americans in expressing indebtedness to the service of volunteer firefighters and medical responders. I am pleased to be appearing alongside Philip Stittleburg, Chairman of the National Volunteer Fire Council, and commend his organization for doing such an outstanding job representing the critical needs of volunteer emergency responders.

The courage and bravery of volunteer firefighters and emergency medical services personnel should be deeply appreciated. Few Americans risk their lives in their given professions; there are even fewer who risk their lives in a volunteer capacity beyond their jobs. Yet, this is the life that volunteer fire and medical personnel have chosen; they answer the call to duty in response to dangerous events ranging from fires and floods to hurricanes and tornadoes and more. Each year in the U.S., dozens of official disasters and emergencies occur. According to the Federal Emergency Management Agency (FEMA), there were 62 Federally-declared disasters and 13 emergencies in 2007 alone. So far in 2008 there have been federally-declared major disasters in

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the states of Arkansas, Hawaii, Iowa, Indiana, Kansas, Missouri, Nebraska, Nevada and Tennessee. At each of these events, local volunteer agencies are invariably the first to arrive on the scene.

Legislative history

In this context, I have been asked to explore the issue of providing job-protected leave for volunteer firefighters and emergency medical services personnel who respond to an emergency or major disaster as declared by the President or a governor. In particular, the Subcommittee is considering the policy included in H.R. 1643, the Volunteer Firefighter and EMS Personnel Job Protection Act, introduced by Subcommittee Chairman Andrews and Representative Michael Castle on March 22, 2007. Companion legislation (S. 2240) was introduced by Senators Thomas Carper and Susan Collins in the U.S. Senate. The bills would provide up to 14 days per calendar year of job protection for volunteer emergency service personnel who respond to a Presidentially-declared disaster in an official capacity. I understand the Subcommittee is also considering adding state-declared emergencies to events covered by the proposal.

H.R. 1643 was incorporated into the text of H.R. 1684, the Department of Homeland Security Authorization Act for Fiscal Year 2008, and passed by the House on May 9, 2007. The Senate has taken no action on H.R. 1684.

Current employer accommodations of employees

U.S. employers provide a host of leave benefits, both voluntary and mandatory, to help employees achieve an effective work-life balance and meet their own professional and personal needs. This includes policies to help employees who serve in volunteer or service capacities. Employers generally are very generous in providing leave benefits; in fact, according to Department of Labor data, nearly 75 percent of employers voluntarily provide some form of paid leave for illness and other personal needs. As a general principle, SHRM believes that employers, not the Federal government, are best situated to know the benefit preferences of their respective employees. Yet, employers are required to provide leave according to several Federal leave statutes that are described here.

The most prominent leave law with which many employers must comply is the Family and Medical Leave Act (FMLA). The FMLA provides leave for the birth, adoption or foster care of an employee's child, as well as for the "serious health condition" of a spouse, son or daughter, or parent, or for the employee's own medical condition. The FMLA allows any covered employee who has worked at least 1,250 hours during a 12-month period in an organization of 50 or more employees to take up to 12 work weeks of unpaid leave during a 12-month period.

The Americans with Disabilities Act (ADA) of 1990 also provides leave benefits to certain qualified employees. In the employment context, the ADA prohibits covered employers from discriminating against both current employees and job applicants with disabilities. In addition, the ADA requires covered employers to provide reasonable accommodations to employees who have known disabilities. Under the ADA, an employee must cooperate in an interactive process with his or her employer to determine any needed reasonable accommodation. Employers giving time off

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from work is among the most common accommodations. Furthermore, ADA-required leave may extend beyond the 12 weeks required for employees covered by the FMLA. Indeed, the ADA provides for no time limit; the length of a leave of absence is determined by what is a reasonable accommodation. In fact, according to EEOC guidance, an indefinite leave of absence can be a required form of accommodation, unless the employer can show undue hardship.

The newest federal leave mandate on employers is a job-protected leave benefit for military family members. On January 28, 2008, President Bush signed H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008, which contained the expansion of the FMLA for qualified family members of U.S. Armed Forces personnel. This new law requires employers to provide the following types of leave:

- **Active Duty Leave**—12 weeks of FMLA leave for an employee whose spouse, son, daughter or parent is called to active duty or notified of an impending call to active duty in the Armed Forces in support of a contingency operation.
- **Caregiver Leave**—26 weeks of FMLA leave during a single 12-month period for a spouse, son, daughter, parent, or nearest blood relative caring for a recovering Armed Forces member.

To underscore the importance of the interplay between these Federal statutes, employers face potential litigation and damages in the event they make incorrect decisions regarding the FMLA, the ADA and other state and federal leave laws. As the Subcommittee considers creating a new leave mandate for a specific segment of the workforce, it is imperative for Members to understand the complexity of the overlap of existing Federal and state leave statutes.

Issues surrounding volunteer emergency responder leave legislation

As mentioned, volunteer emergency response personnel give immeasurable time and energy to serving their nation, their states and their communities with distinction. In addition to serving their communities, volunteer first responders must balance the same professional and social responsibilities that all Americans do. While it may be fitting and proper that the beneficiaries of their volunteer services support them and their units, it is equally important that this support be feasible and meaningful if it includes a federally mandated leave. Accordingly, I am pleased to share my perspective on legislation that would provide a leave entitlement for volunteer firefighters and emergency medical personnel.

Congress has acknowledged that the public benefits from the generosity of volunteerism. For example, in 1985, Congress amended the definition of an employee under the Fair Labor Standards Act (FLSA) so as to exclude from that definition an individual who performs volunteer services for state and local governmental entities. In doing so, Congress promoted the spirit of *bona fide* volunteer services for charitable and public purposes and attempted to remove any obstacles that might discourage or impede true volunteer activities. At the same time, Congress took steps to minimize any potential for abuse of volunteerism, especially as a mechanism to avoid the minimum wage and overtime requirements of the FLSA. During my tenure at the Wage and

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Hour Division, we issued numerous opinion letters to effectuate Congressional intent to promote volunteerism without compromising the protections of the FLSA.

The initial policy question facing members of the Subcommittee is: should the Federal government require employers to provide a minimum of leave to volunteer emergency service personnel? Providing leave to volunteer emergency response personnel is a laudable goal; however, there are many provisions in this proposal that the Subcommittee should clarify and questions that the Subcommittee should address during the debate over this draft policy.

An overriding objective for the Subcommittee should be to ensure that both employees who volunteer as firefighters or emergency medical personnel and their employers, be they small or large, ultimately understand their rights and obligations under any legislation. When employees and employers communicate with each other and arrive at a common understanding, then the prospects for conflict, disagreement or misunderstanding are minimized and, hence, the risk of unnecessary litigation is reduced. Artfully drafted legislation will achieve your policy objectives and promote the interest of good government and mutual knowledge and understanding among employees and employers about their rights and obligations. Conversely, legislation with questionable provisions about relevant rights and responsibilities will often lead to costly litigation.

As the Subcommittee weighs the policy in question, it should take notice of other mandated leave entitlements that Congress has established and learn from the applicable experiences. A case in point is the two categories of military family leave entitlements that were established when Congress enacted the FY2008 National Defense Authorization Act. As you know, the DOL just published on Monday, February 11, its request for comments on these military family leave provisions in conjunction with its notice of proposed rule making on the existing FMLA regulations. By my count, the DOL requested comments approximately 38 separate times, either on different aspects or in response to questions related to the active duty and caregiver leaves. I would urge the Subcommittee to be more precise when it attempts to create a new leave entitlement for volunteer emergency personnel in order to promote understanding for volunteers and their employers and avoid preventable litigation.

Specific concerns

There are significant omissions in this legislative proposal. One aspect of this proposal that the Subcommittee should address is that it charges no governmental department or entity, particularly not the Secretary of Labor, with the responsibility to define by regulation any provision of the proposal. Regulatory guidance would assist employees and employers to know and understand their rights and obligations. A second omission is that the proposal provides no administrative enforcement mechanism. Instead, the only way to resolve ambiguities or unaddressed questions under the new mandated leave program is through unnecessary, costly litigation which, I submit, will not nurture the spirit of volunteerism. Rather, such litigation could discourage individuals from volunteering so that the results of this proposal could be to reduce instances of service by volunteer firefighters and emergency medical personnel rather than to promote such volunteerism through a new federally mandated leave entitlement that protects such volunteers in their employment.

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In addition, there is need for clarification of a number of provisions in this proposal. Simply stated, this proposal makes no differentiation in the characteristics of the employer to which it applies. Consequently, unlike the protections such as the FMLA, ADA or even Title VII, the proposal would apply to *any and all* employers regardless of whether they are a large employer with hundreds of employees or a small employer with one employee. Equally disconcerting, it is unclear if the legislation would cover full-time or part-time employees. Also, the proposal fails to take into consideration its impact upon any employer if an employee is a "key" employee or if a single employer must bear an undue hardship because it has multiple employees who are absent due to the protections afforded by the proposal.

A third point for this Subcommittee to expound upon concerns the requirement that an employee "make a reasonable effort to notify" their employer that the employee may be late to or absent from work. Section 101(a)(6). The proposal fails to provide guidance as to what constitutes reasonable notice. For example, in situations where an employer has absence notification procedures for employees to follow when they will be late to or absent from work, one basic question unaddressed by the proposal is whether reasonable notice means that an employee must comply with the employer's notification procedures. As you are aware, this is an issue of ongoing concern for employees and employers under the FMLA.

Similarly, a fourth point relates to the problematic breadth of the emergencies or major disasters to which a volunteer firefighter or emergency medical staff could be deployed. While volunteers would be covered if deployed to an emergency or major disaster through a coordinated national deployment system like the Emergency Management Assistance Compact, volunteer firefighters would also be covered if deployed to such emergency or major disaster by a state emergency management agency. Yet, the definition of an "emergency" includes an "emergency declared by the governor of a State where such emergency involves the volunteer firefighter or volunteer emergency medical services." Section 101(d)(1). Thus, emergency medical personnel may also be protected if deployed by a state emergency management agency. Aside from the confusion stemming from the coverage and definition of "emergency" provisions, the inclusion of state disasters or emergencies compounds an employee's and employer's ability to determine what disasters or emergencies are covered. Bear in mind that, as mentioned earlier, official disasters and emergencies are not rare occurrences—there are dozens each year in the U.S.

A fifth area to address concerns the language that authorizes an employer to reduce an employee's regular pay for the time an employee is absent from work because the employee provided volunteer services. As you are aware, existing regulations of the DOL prohibit deductions for a partial day absence from the salary of an employee who is employed in a *bona fide* capacity as an executive, administrative or professional employee under Section 13(a)(1) of the FLSA. 29 CFR §541.602. At a minimum, Congress should clarify that an employer could dock a Section 13(a)(1) exempt employee's salary for a partial day absence without violating the salary basis requirement. Congress should also clarify that a full-day absence for volunteering as a firefighter or emergency medical personnel would constitute an absence for a personal day pursuant to section 541.602 so that an employer could choose to make a deduction from an employee's salary for a full day absence in order to minimize the risk that someone may claim that the employer has violated the salary basis requirement.

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A sixth aspect of the proposal that needs clarification involves the verification process. While it does permit an employer to require an employee to provide written notification of the employee's volunteer service, no time frames for compliance with the requirement are provided and no consequences for the failure to provide notification are spelled out. In the absence of some governmental entity that is charged with providing answers to questions such as these and enforcing the protections afforded by this proposal, then this proposal could have the opposite effect and promote more costly, unnecessary litigation rather than volunteerism.

A seventh point on the proposal—as noted earlier, the proposal protects an employee for up to 14 days against termination, demotion or other discrimination in the event the employee is late to, or absent from, work due to responding to a disaster or emergency. Yet, the proposal lacks clarity on whether such tardiness to or absence from work is limited only to the time spent actually volunteering in response to the deployment. In other words, it is unclear whether tardiness to or absence from work in a given week would be protected because an employee was deployed to provide volunteer emergency services that lasted the entire prior week. The protections apply to tardiness or absence "for the purpose of serving" as a volunteer, but the proposal does not address an absence or tardiness that results from an employee purposely serving in a previous, covered volunteer capacity. The Subcommittee may want to examine the provisions of this proposal to determine if it should clarify that its protections apply only for that time—whether it is in terms of days or hours of a day—during which the employee actually is providing the volunteer firefighter or emergency medical services or whether it can include an absence from or tardiness to work that is attributed to prior, covered volunteer service.

Finally, the proposal is unclear as to whether its leave provisions may be taken on an intermittent basis. As you are aware, one major challenge for employers who are covered by the FMLA is managing employees' unscheduled, intermittent leave requests. The Subcommittee should examine the language of this proposal to clarify that it is not mandating another federal leave requirement that allows employees to take leave in any increment with no advance notice.

Even more questions can be raised, such as are the 14 days provided by the legislation intended to be calendar days or work days? How would the proposal interact with an employer's paid leave benefits? Would the legislation include hours of service requirement before the leave benefit can be accessed by an employee? While this may not be an exhaustive list of concerns, this testimony is meant to highlight the most pressing issues with the legislative draft in question.

Conclusion

Mr. Chairman, SHRM greatly appreciates the opportunity to provide testimony on the draft proposal to guarantee job protected leave for volunteer emergency service personnel who respond to emergencies and disasters in an official capacity and appreciates the Subcommittee's interest in the issue. HR professionals and their organizations are committed to assisting their employees, including volunteer emergency services personnel, in balancing both their professional and personal demands, and SHRM believes the vast majority of employers accommodate their employees' diverse needs. I look forward to working with the Subcommittee on the issue, and would be happy to answer any of the Members' questions.

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Chairman ANDREWS. Mr. Robinson, thank you for your very constructive testimony. We appreciate it very much.

Chief, welcome to the subcommittee. We look forward to your testimony.

STATEMENT OF PHILIP STITTLEBURG, CHAIRMAN, NATIONAL VOLUNTEER FIRE COUNCIL

Mr. STITTLEBURG. Thank you, Mr. Chairman.

First of all, let me begin by thanking you personally for the longtime support that you have provided to the fire and emergency services of our country. Your support has long been noted, it is

much appreciated, and I want to take this opportunity to thank you personally for it.

Second, I want to thank you for allowing me to testify today. My name is Chief Phil Stittleburg. I am chief of the LaFarge Fire Department.

I am also chairman of the National Volunteer Fire Council. The NVFC is nonprofit organization. We represent more than 1 million volunteer firefighters and emergency medical personnel throughout the country.

We are found most predominantly in smaller communities. Volunteer fire and EMS personnel serve more than 20,000 communities throughout the United States, and we save our fellow taxpayers about $37 billion a year by virtue of our donated services.

Without the services that these volunteers provide, many communities simply would not have these services because they are not able to afford to purchase them, and this is especially true in rural areas.

First of all, I would like to emphasize that volunteer firefighters and EMS personnel are true professionals. We are trained the same, we respond the same, we give the same service, we accept the same risks, and we do the same job as our paid counterparts. The only difference is that we do it for little or no money, and what that means then is consequently we must have a day job to provide our livelihood. In my instance, I am an assistant district attorney employed by the State of Wisconsin.

The vast majority of incidents that occur in our country every year are handled locally, of course, and many of those are handled by the volunteers that I have just described. In those rare instances where there is a larger incident, an incident too big for the local resources to deal with, why, there is a process, of course, to call in state resources and, of course, there is a process for states to call in other states through the Emergency Management Assistance Compact, EMAC, as many of you are aware.

When we talk about large incidents, I think the images that spring to mind primarily are, say, the terrorist attacks of 9/11 or Hurricane Katrina, but in actual point of fact, there are on average in a given year probably 50 or more incidents that are declared as federal emergencies, and when the nonlocal firefighters and EMS personnel get deployed to these, they are expected to serve for an extended period of time. With a federally declared emergency, they would be expected to respond for up to 14 days.

For many volunteers, absence from their job is a major impediment to being available to respond. Currently, volunteer firefighters and EMS personnel do not have federal protection for responding and, consequently, they are exposed to suspensions, demotions, firing, other sorts of workplace retaliation for missing work because of responding to incidents.

Now some states, of course, have responded to this concern by passing legislation on a state-by-state basis. Most have not.

But what is, I think, even more significant in this area is the chilling effect that the potential for job retaliation has. In other words, volunteers stand the possibility of being told that they are not going to be given the time off or that if they take the time off that they will be required to take their own personal vacation time

to do it and, consequently, they simply are not going to respond. So we have very much of a chilling effect on the ability to provide the response that is needed.

My view is that volunteers deserve protection. We call upon them to donate their time. We call upon them to donate their talent. We should not expect them to also have to put at risk their livelihood. We ask that the federal government provide for up to 14 days of protection per year.

This is not intended primarily to protect volunteers. What it is intended to do is to enable volunteers to do the job that they are trained to do, that is to help and protect the public. Doing this would expand by thousands the number of responders that would be available throughout the country that pre-emergency planners can count on and they know are there and available.

Now I understand concerns briefly raised, although I thought that one of the remarks was particularly interesting, that employers are trying to enable employees to reach a work-life balance. I would suggest to you here this is a work-work balance. The volunteers work in both careers.

Thank you very much, Mr. Chairman.

[The statement of Mr. Stittleburg follows:]

Prepared Statement of Philip C. Stittleburg, National Volunteer Fire Council

Chairman Andrews, Ranking Member Kline and distinguished members of the subcommittee, I'd like to thank you for giving me the opportunity to be here today to speak with you about the need for employment protection for volunteer firefighters and EMS personnel. I am Chief Philip C. Stittleburg of the La Farge Fire Department in Wisconsin and Chairman of the National Volunteer Fire Council (NVFC). The NVFC is a nonprofit organization representing the interests of the more than 1 million volunteer firefighters and EMS personnel in the United States.

Volunteer firefighters and EMS personnel serve in more than 20,000 communities across this country. Their services save local taxpayers more than $37.2 billion each year. Without volunteer firefighters and EMS personnel, many communities, particularly in rural areas, simply could not afford to provide effective emergency services to their citizens.

Volunteer firefighters and EMS personnel receive the same training as their career counterparts and are professionals in all aspects of the word other than the fact that they receive little or no pay for their services. Volunteer emergency responders work full time jobs just like everyone else in order to pay the bills. For instance, I work as an assistant district attorney representing the State of Wisconsin.

The vast majority of emergency response in this country is handled locally. Many states, understanding the value to public safety provided by volunteer emergency responders, have passed laws allowing volunteers to be late or miss work because they are responding to an emergency. Some states even authorize paid leave for government employees who miss work to respond to an emergency.

When a major incident occurs that overwhelms the ability of local agencies to respond, state and, in the most extreme cases, federal assistance can be brought to bear. This process is initiated by a request for assistance by a local agency to the state, and states can request assistance from other states through the Emergency Management Assistance Compact (EMAC). Hurricane Katrina and the terrorist attacks on 9/11 are extreme examples in which significant non-local assistance was required for a sustained period of time, but on average more than 50 incidents occur each year that are severe enough to be declared federal emergencies.

When non-local firefighters and EMS personnel are dispatched to a major disaster they are expected to be able to serve for an extended period of time—in the case of federal disasters, up to 14 days. For many volunteer emergency responders, absence from their employment is a major impediment to responding to a disaster for this amount of time on relatively short notice.

Currently, volunteer firefighters and EMS personnel are not protected against termination or demotion should they miss work when called upon to respond to a

major emergency or disaster. Volunteer emergency responders have been known to return home after responding to a major disaster to find that they no longer have jobs, even in cases where they notified their employer that they would be absent. More frequently, volunteers will check with their employers and either be told that they can't go or that they have to take vacation time in order to respond. My fellow volunteer firefighter John Alchevsky is here today to tell you about the difficulties that he has had getting time off from work to respond to major disasters.

Volunteer emergency responders who travel to a different part of the country to dedicate their time and energy assisting fellow citizens in desperate need of help don't deserve to be rewarded for their efforts with a pink slip. The federal government should provide up to 14 days of job protection per year for volunteer emergency responders who respond in an official capacity to a major disaster. This would not only benefit first responders personally, but with employment protection for volunteers in place, thousands of well-trained firefighters and EMS personnel who volunteer for their local community would be added to the pool of personnel that pre-emergency planners will be able to count on as available to respond in case of a major disaster.

In order to prevent abuse of this system, volunteers should be required to inform their employers that they will be absent and provide reasonable notifications over the course of their absence. Employers should be able to obtain written verification from the agency supervising the response to the major disaster that the employee responded in an official capacity and the dates during which that response took place. Additionally, employers should not be required to compensate employees for the time that they are absent from work.

Thank you again for the opportunity to testify here today. I look forward to answering any questions that you might have.

Chairman ANDREWS. Chief, thank you very much for your testimony. We appreciate it.

We are now going to move to the section of the panel that will deal with the issue of the employment rights of our returning service members who are deployed, whether it is overseas or within our country, and, Mr. Serricchio—did I get it right this time?

Sergeant SERRICCHIO. Yes, sir.

Chairman ANDREWS. Welcome to the subcommittee. We look forward to your testimony.

STATEMENT OF SGT MICHAEL SERRICCHIO, AIR FORCE RESERVES, RETIRED

Sergeant SERRICCHIO. Thank you.

At the time of the 9/11 terrorist attacks, I was a member of the United States Air Force Reserves. On September 30, 2001, I was called to active duty to serve in the war on terror.

At that time, I was employed by Prudential Securities as a financial adviser. I managed, with my partner, approximately 250 accounts with over $11 million in assets under management. I was earning in excess of $75,000 per year.

When I returned from active duty 2 years later, I was offered to return as a financial adviser, yet I was only offered a handful of my former accounts to manage. I was told that I could have an advance of $2,000 per month which I would be required to repay from any commissions earned through cold calling new accounts or from my personal savings.

Neither my prior earnings, my prior accounts, nor my prior assets under management were taken into consideration in the reinstatement offer. In short, I was asked to start my career over from scratch, as there was no way I could support either myself or my wife and 2-year-old daughter under the terms provided. I was forced to seek employment elsewhere.

I am here today to describe what happened to me in an effort to apprise this committee of the tactics employers are taking to avoid their responsibilities under USERRA, the significant impact such tactics have on the lives and families of the service men and women affected, the morale of the entire armed forces, and on the continued vitality of our volunteer armed services.

Briefly stated, here is what happened. At 28, I was accepted into the Morgan Stanley Dean Witter Financial Advisor Training Program. Over the course of the next 18 months, I successfully built a book of business that produced in excess of $300,000 in annual gross commissions.

My success as a financial adviser resulted in my being recruited by Prudential. As an incentive to join Prudential, I was paid an up-front bonus of over $230,000. I joined Prudential in October of 2000 and remained there until I was activated on September 30 of 2001.

Although I was scheduled for only a 1-year activation, I remained on active duty for more than 2 years' service in both Saudi Arabia and in the United States.

I had joined the United States Air Force Reserves when I was 20 years old. For my service in the Reserves, I received, among other recognitions of distinction, a Commendation Medal, a Meritorious Service Medal, an Air Force Longevity Medal, the Airman of the Year, and the National Defense Service Ribbon.

After the 2 years of active duty fighting in the war on terror, I was honorably discharged. I wrote to Wachovia Securities, which 5 months prior had taken over Prudential's retail brokerage department, informing them that I was seeking reinstatement. No one at Wachovia contacted me for 7 weeks, and I was not afforded the opportunity to return to work until 4 months after I had requested reinstatement.

When I was finally allowed to return to work, Wachovia told me that only a handful of my former accounts would be returned to me, accounts that would have produced negligible commissions. Wachovia offered to provide me an advance of $2,000 per month that I would repay through commissions earned on cold calling new accounts or my depleting my personal savings.

Under the terms provided, the likelihood of my being able to sustain myself or my family was minimal. Worse yet, there was a high likelihood that I would owe Wachovia money at the end of each month.

Wachovia did not offer to pay me the salary I had been earning prior to my activation while I would have attempted to rebuild my business, nor did Wachovia offer to give me preferential treatment when new, unsolicited accounts came into the office.

In essence, even though I had previously been managing 250 accounts, $15 million in assets, and earning in excess of $75,000, Wachovia wanted me to start my career over by making cold calls.

Wachovia knew that I had a wife and family to support. Wachovia knew that I could neither support myself nor my family under the terms provided. I rejected Wachovia's offer of reinstatement and brought suit under USERRA.

Wachovia has defended its offer under reinstatement claiming that under USERRA it was not required to reinstate me to a posi-

tion that reflected my prior earnings, accounts, or assets under management.

In addition, Wachovia has responded by instituting a counterclaim against me, seeking to force me to repay the balance of the original $230,000 signing bonus Prudential had given me.

As a returning veteran, it worries me that if a prominent company like Wachovia, which publicly boasts about its commitment to veteran employees, is interpreting USERRA to exclude consideration of prior earnings, duties, and responsibilities, I can only imagine how other less prominent companies are responding to returning veterans.

Job security is both the heart and soul of USERRA. As this committee is undoubtedly aware, USERRA was intended to encourage men and women to serve our country by assuring them that upon their return, their jobs would be promptly waiting for them.

Job security for those who are serving and for those who will be called to serve in the future is essential to not only maintain the morale of our troops, but to sustain the voluntary Guard and Reserve armed force.

If our country does not insist on job security to those who serve under the Guard and Reserve, then the continued vitality of our volunteer armed services is in grave danger.

Again, I would like to thank you for the opportunity to testify.

[The statement of Sergeant Serricchio follows:]

Prepared Statement of Michael Serricchio, Former Air Force Reservist

At the time of the 9/11 terrorist attacks, I was a member of the United States Air Force Reserves. On September 30, 2001, I was called to active duty to serve in the War on Terror. At that time, I was employed by Prudential Securities as a financial advisor. I managed, with my partner, approximately 250 accounts, with over $11 million in assets under management. I was earning in excess of $75,000 per year.

When I returned from active duty, two years later, I was offered to return as a financial advisor, yet I was only offered a handful of my former accounts to manage. I was told that I could have an advance of $2000 per month, that I would be required to repay from any commissions earned through "cold calling" new accounts or from my savings. Neither my prior earnings, my prior accounts, or my prior assets under management were taken into consideration in the reinstatement offer. In short, I was asked to start my career over from scratch. As there was no way I could support either myself, or my wife and two-year old daughter under the terms provided, I was forced to seek employment elsewhere.

I am here today to describe what happened to me in an effort to apprise this Committee of the tactics employers are taking to avoid their responsibilities under USERRA and the significant impact such tactics have on the lives and families of the service men and women affected, on the morale of the entire armed forces, and on the continued vitality of our volunteer armed services.

Briefly stated, here is what happened.

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My success as a financial advisor resulted in my being recruited by Prudential. As an incentive to join Prudential, I was paid an upfront-bonus of over $230,000. I joined Prudential in October 2000 and remained there until I was activated on September 30, 2001. Although I was scheduled for only a one year term, I remained on active duty for more than two years, serving in both Saudi Arabia and in the United States.

I had joined the United States Air Force Reserves when I was 20 years old. For my service in the Reserves, I received, among other recognitions of distinction, a commendation medal, a meritorious service medal, an air force service longevity medal, the airman of the year, and a national defense service ribbon.

After two years of active duty fighting in the War on Terror, I was honorably discharged. I wrote to Wachovia Securities, which five months prior had taken over Prudential's retail brokerage department, informing them that I was seeking reinstatement. No one at Wachovia contacted me for seven weeks and I was not afforded the opportunity to return to work until four months after I had requested reinstatement.

When I was finally allowed to return to work, Wachovia told me that only a handful of my former accounts would be returned to me, accounts that would have produced negligible commissions. Wachovia offered to provide me an advance of $2,000 per month that I would repay through commissions earned on cold calling new accounts or by depleting my savings. Under the terms provided, the likelihood of my being able to sustain myself, or my family, was minimal. Worse yet, there was a high likelihood that I would owe Wachovia money at the end of each month.

Wachovia did not offer to pay me the salary I had been earning prior to my activation while I attempted to rebuild my business. Wachovia did not offer to give me preferential treatment when new unsolicited accounts came into the office. In essence, even though I had previously been managing 250 accounts, $11 million in assets, and earning in excess of $75,000, Wachovia wanted me to start my career over by making cold calls. Wachovia knew that I had a wife and family to support. Wachovia knew that I could neither support myself, nor my family, under the terms provided.

I rejected Wachovia's offer of reinstatement and brought suit under USERRA. Wachovia has defended its offer of reinstatement, claiming that under USERRA it was not required to reinstate me to a position that reflected my prior earnings, accounts or assets under management. In addition, Wachovia has responded by instituting a counter claim against me, seeking to force me to repay the balance of the original signing bonus Prudential had given me.

As a returning veteran, it scares me that if a prominent company like Wachovia—which publicly boasts about its commitment to veteran employees—is interpreting USERRA to exclude consideration of prior earnings, duties and responsibilities, I can only imagine how other less prominent companies are responding to returning veterans.

Job security is both the heart and soul of USERRA. As this Committee is undoubtedly aware, USERRA was intended to encourage men and women to serve our country by assuring them, that upon their return, their jobs would be promptly waiting for them. Job security for those who are serving, and for those who will be called to serve in the future, is essential to not only maintain the moral of our troops, but to sustain voluntary guard and reserve armed forces. If our country does not insist on job security to those who serve under the guard and reserve, the continued vitality of our volunteer armed services is in grave danger.

Chairman ANDREWS. We thank you very, very much for coming with us today. Thank you very, very much.

Mr. Wood, welcome to the subcommittee.

STATEMENT OF GEORGE WOOD, EMPLOYMENT SPECIALIST ATTORNEY, LITTLER MENDELSON

Mr. WOOD. Thank you, Mr. Chairman, Ranking Member Kline, and distinguished members of the committee.

I am honored to be here today to present testimony regarding the proposed amendment the committee is considering under the Uniformed Services Employment and Reemployment Rights Act, also known as USERRA.

I have practiced law for 22 years. I currently work for the firm of Littler Mendelson which has 650 attorneys helping employers each day comply with the various employment laws that have been implemented at both the state and federal levels. For approximately the last 10 years, I have advised employers regarding their obligations under USERRA.

It is my opinion, based upon the clients I have worked with over the years, that employers take very seriously their obligations under USERRA. They also take very seriously the commitment

their employees make to this nation while they are serving in the military.

Rightfully so, USERRA provides covered employees with broad protection, and it is in light of these existing protections that I believe that three of the four proposed amendments that the committee is considering are unnecessary based upon the current standards for USERRA.

As Representative Kline indicated, these are rifle shots that are based at certain instances that have occurred once or twice over the past 13 years.

The proposed amendments are, number one, the amendment to USERRA Section 4303(2) regarding what is included within the phrase "benefit of employment" to include wages. Secondly, the amendment to USERRA Section 4311(a) to include potential applicants for military service, and, third, the amendment to Section 4311 to permit a claim for a disparate impact theory to be used for liability.

I take no position here today with respect to the issue of requiring states to receive federal funds to waive their 11th Amendment rights.

I would like to start off talking briefly about the issues of including wages in Section 4303(2) as a benefit of employment. Currently, that section excludes specifically wages or salary for work performed from the definition of "benefits of employment."

When Congress enacted USERRA in 1994, there was obviously a purpose behind its choice not to include wages or salary within the definition of "benefits of employment," and I believe the Congress chose to exclude wages and salary from that definition due to the impact that that inclusion would have on the employer's legitimate ability to pay employees differently based on valid factors, such as educational background and work experience.

In addition to protecting benefits of employment, Section 4311(a) currently covers applicants and employees from discrimination from such things as initial employment, reemployment, retention in employment, and promotion. These factors are, in essence, all the aspects of the employment relationship, and they are all covered.

Including wages within the standard for benefits of employment would unduly impact an employer's decision regarding what wages to pay different employers. Rather than making decisions based on legitimate and appropriate criteria, employers would have the deck stacked against them from the start.

Any minimal differentiation in wages between a covered employee under USERRA and a noncovered employee would be viewed in many instances as discrimination and would lead to a number of different disputes over that issue. I do not believe that that amendment would further the goals of USERRA, and I would ask that it not be adopted.

With respect to potential applicants for military service, the amendment to include potential applicants within the scope of Section 4311(a) I do not believe is in keeping with what Congress initially intended regarding USERRA. According to the statutory purposes listed in USERRA, it is intended to provide protections to persons who actually choose to participate in military service to receive the act's benefits. Section 4301(a) makes that very clear.

More importantly, however, attempting to determine who is a potential applicant for military service would be almost an impossibility for employers and for the courts. If the amendment is adopted, effectively every person from age 18 to 40 would be included as a potential applicant for military service. Also, we would have to then define what is a potential application for military service. How far down the road do you need to go before you become a potential applicant?

USERRA was designed to protect those persons who actually participate in military service. It was not enacted to advocate in favor of people of people participating in military service. That is what the proposed amendment, in my view, seeks to have happen. The committee should not support this proposed amendment.

Finally, on the disparate impact theory, I believe that adding that would be unnecessary in light of the already broad protections provided by the act. As I am sure the committee is already aware, a disparate impact theory allows a plaintiff to challenge an employer's facially neutral policy. Here, USERRA policies are very broad already.

The current disparate treatment analysis under USERRA already applies and provides full protection for employees. For example, an employer policy requiring a certain level of advance notice before leave is taken is already governed by USERRA. I do not think that you could find a disparate impact analysis that would not already be covered by a disparate treatment claim under USERRA.

Mr. Chairman, I want to thank you and the members of the committee for your time here today.

[The statement of Mr. Wood follows:]

Prepared Statement of George R. Wood, Esq.

USERRA currently provides employees who perform service in the uniformed services with broad protections. If fact, it is one of the broadest federal leave statutes in existence. USERRA currently provides significant rights, benefits and protections to employees regarding military service, including the ability to take up to five (5) years of leave, be reinstated in most instances to the position the employee who have attained had he or she remained continuously employed, obtain benefit protection while on leave, and be protected against discrimination or retaliation on the basis of military service or participation into an investigation regarding a possible USERRA violation.

In my experience, most employers understand the significant sacrifices being made by their employees who, either voluntarily and involuntarily, serve in the uniformed services. To serve our country, these employees are putting their lives on hold, if not also risking their lives for those who remain behind. In recognition of these sacrifices, a number of employers provide benefits to employees on military leave that are not provided to employees on other types of leave, such as supplemental compensation, employer-paid medical benefits and benefit accrual during leave. It has not been my experience that employers seek to shirk their duties and obligations under USERRA, as reasonably interpreted.

The Committee is considering four (4) potential amendments to USERRA: (1) An amendment to the definition of "benefit of employment" found in 38 U.S.C. § 4303(2) to include wages as a benefit of employment;[1] (2) An amendment to 38 U.S.C. § 4311 to explicitly prohibit discrimination against potential applicants for membership in a uniformed service; (3) An amendment to 38 U.S.C. § 4311 to permit covered employees to bring a claim based on a disparate impact analysis; and (4) An amendment to require states receiving federal funding to waive their Eleventh Amendment immunity rights. For the reasons set forth below, I believe that the

[1] This would be accomplished by deleting the phrase "other than wages or salary for work performed" from the definition of "benefit of employment" found in Section 4303(2).

first three amendments should not be adopted by the Committee. I take no position on the fourth.

Summary of positions

1. Amending the definition of "benefit of employment" to include wages as a benefit covered by USERRA would unduly expand the scope of the protections offered under 38 U.S.C. § 4311(a), which currently protects "initial employment," "reemployment," "retention in employment" and "promotion," along with "any benefit of employment," for any person who "applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform services in the uniformed services." Including wages as a "benefit of employment" would hamper an employer's ability to make legitimate distinctions in wages between employees based on valid differences between the work experiences and educational backgrounds of different employees.

2. Amending 38 U.S.C. § 4311 to include "potential applicants" for military service would make the discrimination prohibitions found in USERRA unworkable for employers. It would, in essence, include all persons, ages 18 to 40, within the scope of USERRA's discrimination protections regardless of whether an employee ever truly intends to apply for service in the uniformed services. The current definition properly protects those persons who actually apply for service in the uninformed services and creates a workable and effective prohibition against discrimination that is already effective.

3. Amending 38 U.S.C. § 4311 to include a "disparate impact" analysis is unnecessary. Under the current provisions of USERRA, any employer policy that violates the rights of a covered employee is already governed by USERRA. A disparate impact analysis (which applies to facially neutral policies that have the effect of discriminating against a protected class of persons) would be redundant.

4. As stated above, I take no position with respect to amending USERRA to require states receiving federal funds to waive their Eleventh Amendment immunity rights.

Proposed amendments to USERRA

1. Amending the definition of "benefit of employment" found at 38 U.S.C. § 4303(2) to include wages is unnecessary and may deny employers the ability to make legitimate wage distinctions between employees based on valid criteria.

Statement of position

USERRA provides that an employer may not deny, among other things, any "benefit of employment" to an applicant or employee based of that person's uniformed service membership, application for membership, performance of service, application for service, or other uniformed service obligation. 38 U.S.C. § 4311(a). The current definition of "benefit of employment" excludes "wages or salary for work performed." 38 U.S.C. § 4303(2); see also 20 C.F.R. § 1002. 5(b). The Committee is considering an amendment to the definition of "benefit of employment" to delete the phrase "other than wages or salary for work performed" from the language of Section 4303(2), thereby including wages within that definition. This proposed amendment should not be adopted.

The Committee's consideration of an amendment to Section 4303(2) is apparently based on the Eight Circuit Court of Appeals' decision in Gagnon v. Sprint Corp., 284 F.3d 839, 852-53 (8th Cir. 2002). In Gagnon, the plaintiff claimed discrimination under Section 4311(a) based on a $1,000 difference in pay between himself and another employee. Id. The District Court granted the defendant summary judgment on this claim, holding that there was no basis for a claim of discrimination due to this slight pay differential. The Eighth Circuit affirmed this ruling, properly noting that wages are not included within the definition of "benefit of employment" under Section 4303(2). Significantly, however, no evidence of discrimination based on wages existed in Gagnon.

To amend the definition of "benefit of employment" to include wages would unduly impair an employer's ability to make legitimate distinction in wages between employees. Employers seeking to make legitimate wage distinctions would be faced with the prospect of a claim under USERRA every time a USERRA covered employee is involved. Congress' initial passage of USERRA recognized this potential impact on employers by protecting employment (along with reemployment, advancement and termination from employment and employment benefits), while steering clear of specifically mandating wage protections for covered employees. To include wages with the definition of "benefit of employment" under Section 4303(2) would vastly alter the legal landscape for employers with respect to wage distinctions. The result of this amendment is likely to be that employers will be forced to pay USERRA covered employees the same as non-covered employees (regardless of le-

gitimate differences in education or experience) in order to avoid disputes over this issue. Thus, rather than creating a level playing field for covered employees, USERRA would create a benefit for covered employees not provided to non-covered employees. This change would not be in keeping with the purposes of USERRA, one of which is to "eliminate disadvantages to civilian careers which can result from" uninformed service. The amendment would, in effect, create an advantage for uniformed service that is not available to other employees.

The power of this amendment should not be ignored. Faced with potential litigation over pay disputes, employers may be forced to pay covered employees more and create an inequitable scale vis-a-vis other employees. To do otherwise would subject employers to expensive and time consuming litigation over the issue of a pay distinction between several employees. This is true regardless of whether the pay differential is based on legitimate criteria.

It also may be reasonably anticipated that the amendment would lead to additional litigation in our already overburdened federal courts regarding, as in Gagnon, a wage distinction as small as $1,000.

The present discrimination prohibitions in Section 4311(a) (including protection for employment, reemployment, advancement and retention of employment) properly and adequately protect covered employees against all proper forms of discrimination, without unduly impacting an employer's legitimate decisions regarding wages. The Committee should recommend against adoption of the amendment.

2. Amending 38 U.S.C. § 4311 to explicitly prohibit discrimination against "potential" applicants for membership in a uniformed service.

Statement of position

USERRA currently protects from discrimination or retaliation a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service. 38 U.S.C. § 4311(a). The Committee is considering an amendment to Section 4311(a) that would broad the scope of these protections to include persons who are "potential" applicants for service membership. Section 4311(a) should not be expanded to apply to "potential" applicants for uniformed service, for good and practical reasons.

The proposed amendment to extend USERRA protections to "potential" applicants for uniformed service is premised upon a single case arising in the Southern District of New York. In Podszus v. City of Mount Vernon, N.Y., No. 06-cv-13771, 2007 U.S. Dist. LEXIS 57868 (S.D. N.Y. July 12, 2007), the court held that an individual who chose not to submit an application for membership in a uniformed service (allegedly due to urgings of his employer) was not entitled to protection under Section 4311(a). In so ruling, the court noted that USERRA does not extend to potential applicants to uniformed service.

The proposed amendment to extend USERRA's protections to "potential" applicants for uniformed service disregards the purposes of USERRA and presents a significant dilemma for practical application.

First, contrary to the implication of the proposed amendment, the Congressional purpose of USERRA is not to advocate membership in a uniformed service by protecting the potential for such service. See 38 U.S.C. § 4301(a). Rather, the purpose of USERRA is to provide protections to those persons who actually choose to participate in military service. See id. The distinction is not without a difference as it relates to the proposed amendment. Protecting "potential" applicants under USERRA would, in effect, create a Congressional preference for military service. This is not USERRA's intent. Id.

Second, the proposed extension of USERRA's protections to "potential" applicants presents problems for practical application as the amendment. Who qualifies as a "potential" applicant? What minimum affirmative steps toward membership does one have to take to qualify as a "potential" applicant? What remedies does a "potential" applicant qualify for under USERRA (since the "potential" applicant has never applied for leave and has never been denied any benefits)? It would be difficult, if not impossible, to practically and properly define when an individual qualifies as a "potential" applicant or the circumstances of a "potential" application. As a practical matter, anyone of military service eligible age, i.e., 18 to 40 years of age, could claim USERRA protections as a "potential" applicant. In addition, USERRA entitles service members to the equitable relief of restoration to prior civilian employment status or damages to compensate for wages or benefits lost in connection with the civilian employment. USERRA does not provide damages to compensate an individual for some anticipated (and speculative) loss of service benefits or other damages resulting from the alleged inability to join the service. Such was not the intent of USERRA. To amend USERRA to include "potential" applicants would expand its reach beyond reasonable bounds. (For example, the Age Discrimination in Employ-

ment Act protects persons ages 40 to 70, not those persons who have the "potential" of reaching age 40.)

The existing USERRA definitions make clear that in situations when an individual has not yet applied for service, he or she is simply not eligible for USERRA's statutory protections. There is no ambiguity in this definition; it is both clear and workable in practical application and it neither encourages nor discourages application for membership in the uniformed services. This definition is working well, and is not in need of amendment.

3. Amending 38 U.S.C. § 4311 to explicitly prohibit employer policies, procedures and practices that have a "disparate impact" on service members and others who are protected by USERRA is unnecessary.

Statement of position

Extending the already broad protections of USERRA to include a disparate impact analysis sometimes used under other discrimination statutes in unnecessary. USERRA's current protections are appropriately analyzed under the standard "disparate treatment" legal analysis. In fact, given that any employer policy that has the actual effect of discriminating against a covered employee is already within the scope of USERRA, no disparate impact analysis is required.

While the proposed amendment seeks to include protections from facially neutral policies that have a "disparate impact" on uniformed service members, this largely dormant theory is rarely used and will be difficult to apply in USERRA circumstances. The disparate impact theory applies where a facially neutral policy has a significant adverse impact on a protected class of employees. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). If protected class employees prove that a neutral practice causes a disparate impact on them, the employer may demonstrate that the practice "is job related for the position in question and consistent with business necessity."

Unlike other statutes such as Title VII of the Civil Rights Act of 1964, there is under USERRA only one class of protected persons—those meeting the criteria set forth in Section 4311. Thus, an employer's treatment of such persons through various policies need not to be analyzed as a "disparate impact," since the disparate treatment analysis already exists and is applicable.

Moreover, it is difficult, if not impossible to envision a situation where an employer's policies are not already be governed by the disparate treatment analysis already applicable under USERRA. For example, a facially neutral employer policy requiring two (2) seeks advanced notice before taking a leave of absence would already be governed by 38 U.S.C. § 4312(a)(1). Similarly, a policy limiting the amount of unpaid leave an employee may take would be governed by 38 U.S.C. § 4312(c). I cannot envision an employer policy that would not be already fall within the scope of the disparate treatment analysis used under USERRA if the policy attempts to alter the already specific and detailed requirements of the statute.

Finally, it will be difficult and impracticable to apply a disparate impact analysis to situations involving alleged USERRA violations. Individual employers do not typically have significant numbers of USERRA covered employees compared to the employer's entire employee population, let alone a statistically significant population of such employees. Because a disparate impact analysis typically requires the use of experts and sophisticated statistical methods and findings, for any given employer, it will be difficult to obtain a sufficient statistical group upon which to apply the analysis for purposes of USERRA. See El v. SEPTA, 479 F.3d 232 (3d Cir. 2007)(dismissing employee's disparate impact claim where employer's policy barred the hiring of persons who had conviction records); Malave v. Potter, 320 F.3d 321 (2d Cir. 2003)(employer may defend disparate impact claim by showing the statistical sample used by the employee is too small to establish an inference of discrimination); Shutt v. Sandoz Crop Protection Corp., 923 F.2d 722 (9th Cir. 1991)(statistical disparities must be sufficiently substantial in order to raise an inference of causation, and the statistical evidence may not be probative if the data is small or incomplete).

Given the current breadth of existing USERRA statutory protections under the disparate treatment analysis, there is no need to extend disparate impact protections to covered employees under USERRA. Current statutory protections, therefore, are appropriately analyzed under the "disparate treatment" theory of discrimination (which requires evidence of actual discriminatory intent). No appropriate basis exists to include a disparate impact analysis.

4. Amending USERRA to require States to waive their Eleventh Amendment immunity rights in order to seek federal funding.

Statement of position
I take no position with respect to this issue.

Chairman ANDREWS. Thank you very much, Mr. Wood.
Ms. Piscitelli, welcome to the subcommittee.

STATEMENT OF KATHRYN PISCITELLI, MEMBER, EGAN LEV AND SIWICA, P.C.

Ms. PISCITELLI. Chairman Andrews and members of the subcommittee, good afternoon.

I am Kathryn Piscitelli from Orlando, Florida. My remarks today will focus on several issues that I urge the subcommittee to look at to improve USERRA's protection of our service members in civilian employment: one, mandatory arbitration; two, disparate impact; three, federal funding as a hook to override state sovereign immunity; four, wage discrimination; and, five, protection of potential applicants for military service.

I know that during this hearing, you are also taking testimony on the huge problem of employers imposing mandatory arbitration as a condition of employment. Mandatory arbitration is also a major problem for returning service members under USERRA. However, the Civil Rights Act of 2008, H.R. 5129, of which you are an original co-sponsor, Chairman Andrews, would solve the mandatory arbitration problem under USERRA. I very much appreciate your leadership and co-sponsorship of H.R. 5129, and I urge Congress to pass it as soon as possible.

H.R. 5129 also would improve protection of service members under USERRA in another significant way, by providing a federal funding hook to trump states' 11th Amendment immunity from private suits for monetary relief. USERRA makes available to state employees the same monetary remedies as it does for private and local government employees. Yet, in the wake of Supreme Court decisions narrowing the circumstances under which federal laws can effectively override state immunity, it has become virtually impossible for individuals to bring private action against state employers under USERRA.

The way out of this conundrum is to amend USERRA to condition states' receipt of federal funding on their waiver of 11th Amendment immunity. That is precisely what H.R. 5129 would do.

Again, thank you, Chairman Andrews, for your co-sponsorship of this crucial legislation.

USERRA's prohibition on military-related discrimination would be strengthened by amending USERRA to clarify that the act protects through Section 4311(a) against employment policies and practices that on their face are nondiscriminatory, but have a disparate impact on service members.

Although other statutes expressly provide for disparate impact claims, USERRA does not. As a result, there is judicial uncertainty as to whether disparate impact claims are available under USERRA. Amending the statute would remove the cloud of doubt and thereby ensure that service members who are harmed by facially neutral policies and practices have a remedy under USERRA.

Removing or redrafting the exemption of wages or salary for work performed from the definition of "benefit of employment" at Section 4303, Subsection 2 of USERRA is warranted as well. The exemption evidently was included to clarify that USERRA does not require payment of wages or salary to employees when they are away for military service and thus not performing work for their employers.

But the exemption is ambiguous and, as a result, can and, in fact, has been misconstrued as authorizing pay discrimination against service members. This is truly not an outcome that Congress intended when it enacted USERRA.

In addition, I recommend amending Section 4311(a) to explicitly prohibit discrimination against potential applicants for membership in the uniform service. In enacting USERRA, Congress clearly intended that potential applicants for the service would fall within the ambit of the act's ban on service-related discrimination.

However, there is no express provision to this effect in the statute. In the absence of express protection for such persons, there is a risk that employers will deter employees from joining the military and that courts will do nothing to stop them.

In conclusion, protection of our service members in civilian employment will be improved if mandatory arbitration is abolished and USERRA is amended by providing for disparate impact claims, adding a federal funding hook to override state immunity, clarifying the wage exemption from the "benefit of employment" definition, and explicating discrimination against potential applicants for military service.

It is great that Congress is looking into these issues.

I appreciate the opportunity to testify today.

[The statement of Ms. Piscitelli follows:]

Prepared Statement of Kathryn Piscitelli, Esq., USERRA Practitioner

Chairman Andrews and Members of the Subcommittee, good afternoon. I am Kathryn Piscitelli, of Orlando, Florida. I am a USERRA practitioner and have taken a special interest in USERRA since its enactment. I am a member of the National Employment Lawyers Association (NELA). In 2004, I served as Chair of NELA's USERRA Task Force, which prepared NELA's comments on the Department of Labor's then-proposed USERRA regulations. I have been active in educating other lawyers about USERRA, including giving seminar presentations on and writing articles and other publications about USERRA, as well as providing guidance to lawyers who represent USERRA claimants.

Since USERRA's enactment in 1994, I have tracked case law and other developments under USERRA and have seen how valuable the statute can be to returning servicemembers. I have also, however, seen a number of ways in which the statute could be strengthened, to provide more comprehensive protection for these employees. I think most people would agree that we should do as much as we can to ensure that the men and women who return to civilian life from Iraq, Afghanistan, and indeed any military service, are able to pick up their lives again with as little disruption as possible. These people have made major sacrifices and should not be subjected to diminished employment opportunities as a result of their lengthy, and sometimes repeated, absences from the workplace.

My remarks today will focus on several issues that I urge the subcommittee to look at to improve USERRA's protection of our servicemembers in civilian employment: (1) mandatory arbitration; (2) disparate impact; (3) federal funding as a "hook" to override state sovereign immunity; (4) wage discrimination; and (5) protection of potential applicants for service. I think that if Congress did these five things, it would strengthen USERRA's protection of servicemembers from discrimination, foster elimination of unnecessary barriers to equal employment opportunity for servicemembers, and help servicemembers who have suffered violations of their rights under USERRA by improving the Act's enforcement and remedial provisions.

Mandatory arbitration

I know that during this hearing you are also taking testimony on the huge problem of employers imposing mandatory arbitration as a condition of employment. Mandatory arbitration is also a major problem for returning servicemembers attempting to get their jobs back under USERRA. In fact, in 2006, the Court of Appeals for the Fifth Circuit held that USERRA claims are subject to mandatory arbitration under the Federal Arbitration Act, despite express language in Section 3402(b) of USERRA prohibiting contracts (among other things) that limit any "right or benefit" provided by the law, "including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."1

However, the Civil Rights Act of 2008 (H.R. 5129), of which you were an original co-sponsor, Chairman Andrews, would solve the mandatory arbitration problem under USERRA. I very much appreciate your leadership in co-sponsoring H.R. 5129, and urge Congress to pass it as soon as possible.

Federal funding "hook"

H.R. 5129 also would improve protection of servicemembers under USERRA in another significant way—by providing a federal-funding hook to trump states' Eleventh Amendment immunity from private suits for monetary relief. USERRA makes available to state employees the same monetary remedies as it does for private and local government employees. Yet, in the wake of Supreme Court decisions narrowing the circumstances under which federal laws can effectively override state immunity, it has become virtually impossible for individuals to bring private actions against states under USERRA. The way out of this conundrum is to amend USERRA to condition states' receipt of federal funding on their waiver of Eleventh Amendment immunity. That is precisely what H.R. 5129 would do. Again, thank you, Chairman Andrews, for your co-sponsorship of this crucial legislation.

Disparate impact

USERRA's prohibition on military-related discrimination would be strengthened by amending USERRA to clarify that the Act protects against employment policies and practices that on their face are nondiscriminatory but have a disparate impact on servicemembers. Although other statutes expressly provide for disparate impact claims, USERRA does not. As a result, there is judicial uncertainty as to whether disparate impact claims are available under USERRA.2 Amending the statute would remove the cloud of doubt and thereby ensure that servicemembers who are harmed by facially neutral policies and practices will have a remedy under USERRA.

Wage discrimination

Removing or redrafting the exemption of "wages or salary for work performed" from the definition of "benefit of employment" at Section 4303(2) of USERRA is warranted as well. This exemption evidently was included to clarify that USERRA does not require payment of wages or salary to employees when they are away for military service and thus not performing remunerable work for their employers.3 But the exemption is ambiguous and, as a result, can be and, in fact, has been misconstrued as authorizing pay discrimination against servicemembers.4 This is surely not an outcome that Congress intended when it enacted USERRA.

Protection of potential applicants for service

In addition, I recommend amending Section 4311(a) to explicitly prohibit discrimination against potential applicants for membership in a uniformed service. In enacting USERRA, Congress clearly intended that potential applicants for the service would fall within the ambit of the Act's ban on service-related discrimination.5 However, there is no express provision to this effect in the statute. In the absence of express protection for such persons, there is a risk that employers will deter employees from joining the military, and that courts will do nothing to stop them.6

Conclusion

In conclusion, protection of our servicemembers in civilian employment will be improved if mandatory arbitration is abolished and USERRA is amended by providing for disparate-impact claims; adding a federal-funding hook to override state immunity; clarifying the wage exemption from the benefit-of-employment definition; and explicitly prohibiting discrimination against potential applicants for military service.

It's great that Congress is looking into these issues. I appreciate the opportunity to testify.

ENDNOTES

[1] Garrett v. Circuit City Stores, Inc., 449 F.3d 672 (5th Cir. 2006).

[2] See, e.g., Miller v. City of Indianapolis, 281 F.3d 648, 651 (7th Cir. 2002) (leaving open the question of "whether a disparate impact claim can be prosecuted under USERRA").

[3] See S. Rep. No. 103-58 (1993) at 41 ("[S]ection 4303(2) would define * * * 'benefit of employment' * * * as any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work not performed while absent from employment) that accrues by reason of an employment contract or an employer practice or custom and includes by way of illustration the various attributes of the employment relationship that might be affected by an absence from employment.") (Emphasis added.)

[4] See, e.g., Gagnon v. Sprint Corp., 284 F.3d 839, 852-53 (8th Cir.) (because "benefit" as defined in USERRA excludes wages or salary for work performed, employee could not bring claim alleging that employer discriminated against him by paying a him lower starting salary because of his military background), cert. denied, 537 U.S. 1001 and 537 U.S. 1014 (2002).

[5] See H.R. REP. No. 103-65, pt. 1, at 23 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2456 ("Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against * * * current employees who seek to join Reserve or National Guard units * * *") (citing Boyle v. Burke, 925 F.2d 497 (1st Cir. 1991)). In Boyle, a case under USERRA's predecessor legislation, the court found that the law protected against policies that deter employees from joining the reserves. See Boyle, 925 F.2d at 502.

[6] See, e.g., Podszus v. City of Mount Vernon, N.Y., No. 06 Civ. 13771, 2007 WL 2230106 (S.D. N.Y. July 12, 2007) (employee's claim alleging that employer violated § 4311(a) by denying him permission to join Navy Reserve was dismissed because as potential, rather than actual, applicant for service, employee was not protected under § 4311(a)).

Chairman ANDREWS. Thank you very much.

I want to thank the entire panel for very illuminating and well-thought-out testimony. Thank you, each of you.

We will begin with the questions.

Mr. de Bernardo, your organization keeps track of data on these arbitration issues?

Mr. DE BERNARDO. We do not, but we do keep track of the data that is generated by research out there——

Chairman ANDREWS. Could you tell us——

Mr. DE BERNARDO [continuing]. Many of which is included in the testimony.

Chairman ANDREWS. How many people, when presented with an application or employment contract that have a mandatory arbitration clause, refuse to sign it and get hired anyway? Do you know?

Mr. DE BERNARDO. I have never seen statistics in that regard.

Chairman ANDREWS. Do you know if any are available?

Mr. DE BERNARDO. I have never seen them. I would be interested to know that as well.

Chairman ANDREWS. I would be very interested. If you now, I would invite you to supplement the record.

Ms. Jones, did anybody explain to you that the agreement you signed with Halliburton had this binding arbitration provision in it?

Mr. JONES. No, I found out about the arbitration clause in my contract when I came home and sought legal representation for a civil suit. You know, I was 20 years old at the time. I would not even have known what arbitration was or probably how to even pronounce it.

Chairman ANDREWS. And I am just going to ask you based on your experience. When you applied for the job at Halliburton, when did you sign the contract? Was it the end of the process or after you were interviewed?

Mr. JONES. We had to go to a month of training before we were to go Iraq, and it was the last day of that month of training, and it was an 18-page document, and it was a very tiny paragraph.

Chairman ANDREWS. Did anyone explain to you at any time during that month that if you agreed to work for Halliburton, you would not be able to pursue a claim in court?

Mr. JONES. No, I had no idea.

Chairman ANDREWS. Did anyone who was your fellow trainee ask?

Mr. JONES. No.

Chairman ANDREWS. How old were your fellow trainees at the time?

Mr. JONES. Some were older. It was an array of ages.

Chairman ANDREWS. Did anyone at Halliburton advise you that you should talk to a lawyer before you sign the contract?

Mr. JONES. No.

Chairman ANDREWS. Again, on a very personal level, I am sorry you have to be here today. I just have an awful lot of respect for what you have been able to do, and I hope the result of what you have been able to do is that others will not be subject to not only the personal violations you have suffered, but the violation of your rights, and we appreciate that.

Mr. JONES. Right.

Chairman ANDREWS. I want to ask Mr. Wood a question about his testimony about USERRA.

You make a comment in your testimony that the amendment in front of us would, in effect, create an advantage for uniform service that is not available to other employees.

I just want you to focus on these facts for a minute that, you know, a person builds a book of business, goes away because he has volunteered to serve in the armed forces, comes back and the book of business is taken away, and the person has to start all over again, whereas the person he sat next to in the cubicle next door does not enlist in the armed forces, spends those 2 years furthering his or her book of business, and is able to have a substantially higher income. Is that fair, do you think?

Mr. WOOD. Mr. Chairman——

Chairman ANDREWS. Is that fair to the person that volunteers to wear the uniform?

Mr. WOOD. Mr. Chairman, I have read through the facts. I do not know that I can comment on Mr. Serricchio's case, but I know that——

Chairman ANDREWS. I am actually not asking you to comment on his case. The hypothetical that I put to you.

Mr. WOOD. The hypothetical that you gave—I guess I would have a couple of questions to figure out effectively why the work went away because between the time Mr. Serricchio left and the time he came back, there were a lot of different factors that happened. I think a lot of people lost a lot of business.

Under the factors that you gave, there has to be a decision made. Yes, if his book of business was taken away and not given back, that would be one thing. But if because he left, his book of business decreased because of other economic factors, I guess I do not know. I am not sure where we put the burden here. Are we putting the burden on the employer or——

Chairman ANDREWS. Well, it seems pretty obvious the burden falls on the person who volunteers to wear the uniform and goes

away. I mean, if you have a client-based business and you cannot be there to service the clients for that 2-year period, it seems to me it is kind of inevitable that the business is going to go away.

Mr. Serricchio, what do you think would have been a fairer accommodation under your facts when you came home? What would have been fair for the employer to do, in your opinion?

Sergeant SERRICCHIO. Well, sir, thank you. Under USERRA, under the statute, it clearly states that the returning veteran is to be brought back at the pay status, the seniority, the benefits, the marketability that he or she would have attained as if they never had left.

There are at minimum a few points that probably could have been entertained, one of which would have been to offer me a salary comparable to what it would have been had I never gone while I rebuilt my business. If that was not an option, perhaps handing accounts over that could have yielded a comparable salary, again, to afford me the time to rebuild my business.

What was basically offered to me was the same rate of pay that a commissioned broker gets, and it is essentially meaningless if you have nothing to apply that rate to, if your assets are gone, if your book is business is gone, and some of these options came from Captain Samuel Wright who actually spent the better part of 37 years putting together the product that we all know as USERRA.

So, sir, to answer the question, I think those were some of the points that could have been entertained.

Chairman ANDREWS. I appreciate that.

My time has expired.

And we now turn to Mr. Kline for his 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman.

And thank you to the witnesses for your trip here, for your patience, and for your excellent testimony.

And I am on the green light-red light system as well, so I have about 5 minutes. I am not sure where to start. It is quite an array out there.

So, if you will just bear with me, I will kind of shotgun my way through, getting away from the rifle shot program that I was talking about earlier.

Mr. Serricchio, could I just ask for the record, did your employer pay you while you were in uniform?

Sergeant SERRICCHIO. Sir, I was gone, as I mentioned in my testimony. I was given a 1-year activation when I first was activated, and into that first year, we were subsequently given a second term.

Mr. KLINE. Okay.

Sergeant SERRICCHIO. During the first——

Mr. KLINE. Thank you. Thank you. I appreciate that very much.

Sergeant SERRICCHIO. Can I answer?

Mr. KLINE. Really, I am very limited on time, and I have nine more witnesses. Thank you. I need to keep moving through here.

Ms. Jones, I want to add my apologies as well. I mean, this is awful what has happened to you. I cannot imagine what the other side of your story is. I know in many of these cases that there are two sides to every story, and I suppose there are two sides to yours, too. I just cannot imagine what it is. It is just absolutely atrocious.

Mr. de Bernardo, in looking at Ms. Jones's case, a couple of things I want to sort of cover here. There is nothing in your understanding of the arbitration rules or anything that prevents criminal action being taken care of in court, right?

Mr. DE BERNARDO. That is correct.

Mr. KLINE. These are criminal acts here——

Mr. DE BERNARDO. That is right.

Mr. KLINE [continuing]. And, in my judgment, it is pretty clear that somebody needs to be in jail, and there is nothing that would preclude that. Is that right?

Mr. DE BERNARDO. That is correct.

Mr. KLINE. Okay. And then I am led to believe—and I just need some clarification here—and we are probably not going to get the answer to all of these in a few minutes, but is it possible for a government agency to bring a civil claim on Ms. Jones's behalf?

Mr. DE BERNARDO. Yes, you cannot waive your rights under, for example, the EEOC, Title VII, with mandatory arbitration or not. You still have that recourse of going to EEOC or to a state agency. You cannot waive that prior to a dispute, post-dispute, at any time.

Mr. KLINE. I see.

Mr. DE BERNARDO. So that would be the example that would be most common and applicable.

Mr. KLINE. Well, it is such a horrible——

Mr. DE BERNARDO. It certainly sets a precedent.

Mr. KLINE. It is such a horrible situation. I would just like to think that there are some other remedies out there, and certainly criminal court—but this is so appalling. There is no possible explanation of——

Mr. DE BERNARDO. And beyond the criminal justice system is the civil justice system as well, in which, obviously, litigation is being pursued in that regard.

Mr. KLINE. Civil litigation is being pursued?

Mr. DE BERNARDO. Damages. Well, I understand that there is the civil suit that is pending as well.

Mr. KLINE. And the arbitration rules do not preclude that?

Mr. DE BERNARDO. I do not know what the status is. You know, I was asked to testify on——

Mr. KLINE. Okay. Could I ask Ms. Jones? You are trying to pursue civil action in civil court and being told you cannot? Is that right?

Mr. JONES. By the other side. It is pending before the judge whether or not it would be fair to arbitrate my claim or not.

Mr. KLINE. Okay. Still to be determined?

Mr. JONES. Right.

Mr. KLINE. Okay. Thank you very much.

And then, Mr. Wood, in view of the changes that were proposed by Ms. Piscitelli—I probably messed that up. I know. I am sorry.

Ms. PISCITELLI. That is fine.

Mr. KLINE. Can you expand on your concerns which you started to set forth in your testimony in regards to the changes that she has proposed?

Mr. WOOD. Yes. Thank you, Mr. Kline.

Mr. KLINE. You will probably only be able to pick one of them, so——

Mr. WOOD. Right. I think the biggest concern that I would have at this point would be with the disparate treatment analysis simply because the breadth of USERRA is such that I cannot imagine a situation that would not be covered from an employer's policy perspective by USERRA to protect someone's rights. The disparate treatment analysis covers those adequately.

I have handled cases where a lot of those issues have been raised. No one has ever sought a disparate impact analysis, and the problem with the disparate impact analysis is you have to have a statistically substantial sample of people to analyze and, typically, most employers do not have that many people out on leave. So it is very difficult to have that analysis applied to a case where you already have such broad protections.

Mr. KLINE. All right. Thank you.

I see it is about to turn red. I will yield back, Mr. Chairman.

Chairman ANDREWS. I thank the gentlemen.

The Chair recognizes the gentlewoman from California, Ms. Sanchez, for 5 minutes.

Ms. SANCHEZ. Thank you, Mr. Chairman. And I have to commend you for holding this hearing. I also chair the Commercial Administrative Law Subcommittee on the Judiciary which has jurisdiction over mandatory binding arbitration clauses and contracts, and we have had a number of hearings on this very issue in many different contexts, including in the nursing home context, homebuilding context, and also the employment context, which, I think, is a nice crossover issue for this committee.

I would like to start with Ms. Jones and, again, echo the sentiments of our chairman. I think it is very courageous that you are here to talk about your story.

Mr. JONES. Thank you.

Ms. SANCHEZ. What do you think would have happened to you had you refused to sign that binding arbitration contract at the end of your training right before you were ready to deploy?

Mr. JONES. I do not think I would have been hired.

Ms. SANCHEZ. My guess is that you probably would not have been hired as well.

You said that you really did not know much about binding arbitration, probably would not even know how to pronounce it. I am wondering, in your wildest imagination, would you have ever thought that signing that contract would have, for all intents and purposes, insulated criminal behavior like being drugged and raped from your coworkers? Could you have even imagined that that would have happened?

Mr. JONES. I could have not ever imagined that, and I could never imagine signing my rights away to a trial by jury.

Ms. SANCHEZ. That, I think, speaks to Mr. Foreman's concern about the way that mandatory binding arbitration changes the substantive rights that individuals have. Some of the problems that we have seen in the different contexts include a lack of ability to get full discovery. You have very limited discovery in arbitration. You do not have a trial by jury. In many instances, if there is a bad arbitration decision, there is no right to appeal.

And so there is a whole plethora of rights that people sign away, not knowing, simply because they are looking to be employed and

do not understand at the time that they are signing these contracts that all of these can come back to haunt them later.

I am curious, Ms. Jones. Were you told by human resources at Halliburton about the sexual harassment and assaults that were occurring in Iraq?

Mr. JONES. No.

Ms. SANCHEZ. Did anybody talk to you about that?

Mr. JONES. It was not disclosed.

Ms. SANCHEZ. And do you think if you had known about that, you might have sort of considered whether or not you wanted, in fact, to go work there?

Mr. JONES. I would not have gone, especially knowing that I was going to be placed in a predominantly all-male barrack in that type of atmosphere. I would not have gone.

Ms. SANCHEZ. And do you think that Halliburton lived up to its part of the employment contract to provide you with an environment that was free from sexual harassment and abuse?

Mr. JONES. Absolutely not.

Ms. SANCHEZ. Thank you.

Mr. de Bernardo, in reading your written testimony, you write that there would be winners and losers—and I am using your terminology—if H.R. 5129 is enacted, and in your written testimony, you say that the only winners would be plaintiffs' lawyers and undeserving employees.

What about the employee sitting to your left that just testified on the panel today? Do you think Ms. Jones is an undeserving employee?

Mr. DE BERNARDO. We are not here to talk about arbitration and H.R. 5129. As I have pointed out, Representative Sanchez, overwhelmingly, the people who participate in binding arbitration favor it, even after the process is done, which is——

Ms. SANCHEZ. Something can be popular and still not be fair or just or, you know, adhere to our notions of fair play and justice in this country?

Mr. DE BERNARDO. Well, there may be exceptions, but, in general, mandatory binding arbitration is a very positive workplace practice that is embraced by both sides, including plaintiffs' lawyers and defense lawyers, with respect to——

Ms. SANCHEZ. I think the——

Mr. DE BERNARDO [continuing]. Employees themselves.

Ms. SANCHEZ. It depends sort of on your case, and it depends on what the outcome of your case is. Do you believe that there are no bad actors in the employer field?

Mr. DE BERNARDO. No, of course not. I think there are bad actors in every field.

Ms. SANCHEZ. Okay. If there is even one employer who is a bad actor, would not an injunction against bad practices and the imposition of punitive damages set an example that could perhaps be a deterrent against other employers engaging in that similar behavior?

Mr. DE BERNARDO. You know, in the American Arbitration Association itself, there is more than 200,000 arbitrations a year. They are just one of the groups that provide arbitrators. There are literally hundreds and hundreds of thousands of arbitrations a year.

Ms. SANCHEZ. But I am asking you——
Mr. DE BERNARDO. What we know is——
Ms. SANCHEZ. If there is a bad actor——
Mr. DE BERNARDO. What we know is that in arbitration, employees are more likely to prevail than in litigation. They get higher median awards.
Ms. SANCHEZ. I am going to have to stop you there because I do not believe that is the case. I believe in many instances employees who would like to litigate cases and find themselves trapped by binding arbitration cannot even find an attorney to take their case because they know that the deck is stacked against them in binding arbitration.
Many times, you have the repeat arbitrator problem in which the employer pays for the arbitrator so they have a built-in incentive to rule on behalf of the employer because they are the ones that are footing the bill for their paycheck.
The other——
Mr. DE BERNARDO. No, I think just the opposite is true.
Ms. SANCHEZ. The other——
Mr. DE BERNARDO. I think there is more access——
Ms. SANCHEZ. Pardon me.
Mr. DE BERNARDO [continuing]. To justice through arbitration.
Ms. SANCHEZ. The other issue that I want to sort of dispute is you said that there are less legal fees in arbitration than there are if you litigate. Arbitration oftentimes saddles the claimants with a whole plethora of extra fees that they would not be charged had they gone to court.
The National Arbitration Forum charges $75, for example, to issue a subpoena, which is provided for free by the court system. The NAF also charges fees for discovery requests of $150 and continuances of $100, which are also free if a litigant is actually in court.
Chairman ANDREWS. Excuse me. Could we just wrap up and have him answer the question?
Ms. SANCHEZ. Sure. I am interested in knowing when you talk about what is cost effective, is what is cost effective to the employer always cost effective to the employee in the arbitration setting?
Mr. DE BERNARDO. The clients of Jackson Lewis and, certainly, the clients that I advise pay for all the expenses of arbitration and mediation. Typically, it is a two-step process, mediation, then arbitration, or a three-step process, informal mediation, formal mediation, and then arbitration. I certainly would advise all employers and certainly employers that I am familiar with to pay all the costs of arbitration.
What you do not have in arbitration is giving 33 percent or 40 percent of whatever the award is to a plaintiffs' lawyer. That does not occur in arbitration. It does happen in lawsuits.
Ms. SANCHEZ. I recognize that my time has expired, and I would just say, in many instances, that is the only access to legal recourse that wronged employees have, and with that, I will yield back.
Thank you, Mr. Chairman.
Chairman ANDREWS. I thank the gentlelady very much.
The Chair recognizes the gentleman from Louisiana, Dr. Boustany, for 5 minutes.

Dr. BOUSTANY. Thank you, Mr. Chairman.

Mr. de Bernardo, one concern we have heard from the other side of the aisle in particular is that arbitration agreements are too often one-sided or unfair and that an employee is unduly disadvantaged by these one-sided agreements.

In your experience and observation, are the courts routinely enforcing one-sided or lopsided arbitration agreements, and are the courts adequately serving their gatekeeper function to ensure that unfair or unbalanced agreements are struck down?

Mr. DE BERNARDO. Congressman, I am a defense lawyer in employment areas. You know, perhaps the single most important aspect of evaluating a case when it comes in is who the judge is, who is going to be assigned. There is a great variety in terms of the judiciary; who has appointed the judge and what his or her philosophy is. Our case assessment very heavily relies on the judge that is going to be assigned.

As I mentioned in my testimony, if you want fairness in America, go to arbitration because there is much more balance, you are much more likely to get somebody who is balanced and neutral in arbitration than you are going to court. So, yes, I would say arbitration is a very viable alternative in that regard, more predictable.

Dr. BOUSTANY. Thank you. Do you think employers are duping employees into waiving criminal law protections with regard specifically to these binding arbitration agreements? I mean, are you aware of any cases where employers are deliberately trying to deceive employees with regard to waiving their——

Mr. DE BERNARDO. No, I am not aware, and, in fact, if there were those cases, then I think, you think, there is a potential cause of action for the individual, and if they have been deceived by the employer into signing potentially a document that they were lied to about, then, sure, I think there is a cause of action that exists there.

Dr. BOUSTANY. Thank you.

And with regard to H.R. 5129 and the issue of retroactivity, is it your testimony that this bill would strike down every employment agreement previously entered into under employment law, and what about pending arbitrations, cases already in process? What would happen to those cases?

Mr. DE BERNARDO. Yes, it is my opinion that what we have in the United States are in excess of a million existing, valid, and enforceable mandatory binding arbitration agreements in employment that would be rendered null and void by this sweeping action.

Some of those agreements have been in place for decades with employees. Some are involving very senior executives. Some are very enthusiastically embraced by the employees. You know, there are many, many success stories on how this has been successful, how it makes for better employers and improved morale, and yet regardless of what the employee's intent, desire, preference is, those agreements would be prohibited.

Dr. BOUSTANY. Thank you.

Ms. Piscitelli, where would you draw the line on disparate impact? Have you given some thought to that?

Ms. PISCITELLI. Where would I draw the line——

Dr. BOUSTANY. Yes.

Ms. PISCITELLI [continuing]. Between what is not and what is?

Dr. BOUSTANY. Yes.

Ms. PISCITELLI. Well——

Dr. BOUSTANY. I mean, would not that be a difficult issue and create a lot of confusion?

Ms. PISCITELLI. Well, I would like to say one thing. I think that the act already does prohibit disparate impact. Section 4311(a) does not require intentional discrimination. It specifically says that "a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

There is nothing in that protection that specifically prohibits intentional discrimination. It is broad enough to include disparate impact. The problem arises with subsection C of 4311 which says that "an employer shall be considered to have engaged in actions prohibited" by the section that the employees or the applicants, service or membership in the service, or application for service is a motivating factor.

So I think that is already there.

I do not see why disparate impact would be more of a problem under USERRA than the Americans with Disabilities Act. The Americans with Disabilities Act includes on the prohibition of discrimination on the basis of disability standards, practices, policies that have a disparate impact on either one person with a disability or a group of people.

So a class of one type of disparate impact model is already found in one of our federal employment statutes.

Dr. BOUSTANY. Mr. Wood, could you comment on that?

Mr. WOOD. Yes, sir, Mr. Boustany. I would say that the issue with the disparate impact claim is really with the claim itself because it is not a well-received claim in the courts. It is based on statistics. You have competing experts. You do not have really witnesses coming in and testifying about what happened or what did not happen.

You have an expert on each side that comes in and takes this set of assumptions and this one takes this set of assumptions, and if you change the assumptions slightly, the statistics change drastically and, ultimately, you end up in a situation where you are really not litigating over a case of what happened to whom or what happened to one person or another. You are litigating over statistics.

Dr. BOUSTANY. Thank you.

I see my time has expired. Thank you, Mr. Chairman.

Chairman ANDREWS. I thank the gentleman.

The Chair recognizes the gentleman from Pennsylvania, Mr. Sestak, for 5 minutes.

Mr. SESTAK. Thanks, Mr. Chairman.

I just have two comments and maybe a question over here.

First, Sergeant, I joined up during the Vietnam War when there was a draft, and I spent 35 or so years in the military. I had never

known until now that USERRA did not cover wages. I just do not understand it. I have watched ever since Desert Storm how indispensable our Reserve, Guard, et al., are.

Just for comment, I just cannot believe that those who wear the cloth of our nation and come overseas to help the active are not given the equal wage consideration.

Chairman, I was taken by your—again, I was a fire marshal my first couple of years in the military, along with other things, and I have always felt very strongly that, you know, your service is not dissimilar to the sergeant's. What distinguishes you is you share in your career what is different, the dignity of danger.

Now here you are twice the citizen, as Winston Churchill said, ready to go forward anywhere and help out, and all you are asking for is 14 days to help society. Again, it just seems to be a no-brainer to me.

But my question is over here. Now 30-some years defending the right for people to have a trial, their day in court, I lived in a system where we did not get arbitration when one of my family members lost her taste because a military doctor went through and perforated it down her stomach and then lost her taste. We did not even get the right to arbitration, never mind the right to court, in the military. I was always taken by that.

So, when I sit back and I ask you what is your standard for goodness here, I look at what you say, ADR gives us more resolve, they resolve themselves sooner, they seem to give us better workplaces. What is your real definition or standard where you can kind of sit back and say, "Yes, we had really better outcomes," not just more efficiency?

Mr. DE BERNARDO. Well, yes, my point there, Congressman, is that employers are better——

Mr. SESTAK [continuing]. Answer to that is—the reason I bring that up is how do we know if we have no transparency on what the outcome is. I mean, the three branches of government were set up so one was a check and a balance on someone else. What is the check and the balance on the private company or the arbitrator if you cannot see what the results are?

Mr. DE BERNARDO. Okay. There are a couple of questions there. The check and the balance is something I mentioned before, that you cannot waive your rights under Title VII. You cannot waive it before a dispute, after a dispute. You still have that option of going to——

Mr. SESTAK. A civil right.

Mr. DE BERNARDO. Yes, your civil rights.

Mr. SESTAK. But I was not talking on that.

Mr. DE BERNARDO. Okay. As far as, you know, this idea of your day in court, I was trying to make that point earlier in terms of access to justice. Arbitration provides a means for access to justice that would be denied to the vast majority of people who go into dispute resolution programs or ADR programs. Those complaints simply would not be embraced.

The National Work Rights Institute has constantly said and testified up here on the Hill. There is a threshold of about $75,000 for plaintiffs' lawyers. They are not going to accept cases typically unless they think that there is a recovery of $75,000 or more. The ma-

jority of employment disputes—a clear majority—an overwhelming majority—involve a dollar amount less than that.

So what happens to those people? Where do they go if you do not have an arbitration process?

In fact, one of the areas in which we practice, I practice——

Mr. SESTAK. Could you answer one of my questions about not being able to see all the results? You know, the arbitration clause says "and the results are to be kept confidential."

Mr. DE BERNARDO. And so the question is?

Mr. SESTAK. And how do we assess whether this is a good system that is working well and fairly?

Mr. DE BERNARDO. Well, one of the ways we assess it is the way that I talked about in the testimony, both written and verbal, which is what about those people who participated in mandatory binding arbitration and, as I mentioned repeatedly, overwhelmingly, they are supportive and they say that they will do it again.

Mr. SESTAK. My time is up.

I guess my take has always been, for a concluding comment, is if a company does feel as though they are right, why do they worry about going into court to defend the goodness of what they have done?

And so I kind of sit back and am quite taken by you, Mr. Foreman. It is the pre-dispute issue here for me, that you are precluded from going forward. I have always looked at laws——

And if I could just have 30 more seconds, Mr. Chairman.

Chairman ANDREWS. Sure.

Mr. SESTAK. I have always looked at laws as kind of keeping the barbarians from the gate, and that is what courts, of course, do, messy as it might be, and it just seems when I look at Ms. Jones that it is pretty obvious that a private company did not keep the barbarians from her, and it is a private company that we are relying upon in arbitration really. It is not an open system, a court of law.

Thank you.

Chairman ANDREWS. Thank you. The gentleman's time has expired.

The Chair recognizes the gentleman from Illinois, Mr. Hare, for 5 minutes.

Mr. HARE. Thank you, Mr. Chairman.

And thank you all for coming today.

Mr. Serricchio, my friend, Mr. Kline, was asking you a question, and he had a lot of people that he was trying to get answers from, I understand, but you were trying to answer, I think, the second part of that question. I would like to, you know, maybe use some of my time in 5 minutes, if you would not mind, to respond to the second part that you did not get a chance to.

Sergeant SERRICCHIO. Thank you, sir. In regards to if Prudential had paid me while I was activated, I was activated first for 1 year and subsequently given a second year activation. For the first year, Prudential did pay me. However, I was required to agree that I would pay that back from commissions earned when I was reinstated back into work.

So they paid me for the year, but, ultimately, I was going to be required to pay that back, and, again, when I had come back, there was nothing left to pay that remedy, sir.

Mr. HARE. Thank you. And I have to tell you I think what happened to you was inexcusable. I mean, we are supposed to be taking care of the people who fight to defend this country, and then you come back, and you have that happen to you, and I just want you to know I am very sorry that that happened to you, you know.

And, Ms. Jones, let me just, you know, thank you for having the courage to come today. And I know this has been asked before, but I am having a really hard time trying to get my mind to wrap around this. You signed this, right?

Mr. JONES. Yes.

Mr. HARE. But you really did not even know what you were signing, I guess, at the time, right?

Mr. JONES. Well, it was an 18-page document, and it talked about travel and all this stuff, so—yes.

Mr. HARE. Well, listen, I thank you for the courage to come, you know, this afternoon and to share this.

Mr. Foreman, you state in your testimony that the Supreme Court has ruled that mandatory arbitration agreements should only alter the forum in which employment disputes are resolved, and some other things, too, yet employees are not being told when they sign these agreements that they waive their access to rights through the courts.

How can we reestablish the intent of these agreements to only alter the forum in which these disputes are settled? That is like a three-part question for you with probably about 2 minutes to go here. And how can we ensure that the employees that are not intimidated are given partial information to convince them to sign away their rights?

I, again, just find that what happened, you know, to Ms. Jones is just absolutely mindboggling, that we would actually have contractors that would put people in that type of situation.

Mr. FOREMAN. Thank you, Congressman.

On that point, I think the way the bill addresses this, particularly with pre-dispute binding arbitration, solves a lot of those issues because once you ban that, everyone is very used to entering into arbitration agreements when it is voluntary and knowing.

And to my colleague's point here, he keeps citing statistics about how overwhelmingly popular these are, but they are arbitration agreements where people actually had a dispute, they knew what they were giving up, they were advised by counsel, and they chose this forum. So, naturally, they are happy with that.

Back to sort of just bridging that to the retroactivity question, if our colleagues are correct that everyone loves these, I would think that if it is retroactive, the vast majority of the individuals would continue to operate under these binding arbitration agreements because they have proven to be effective in that sense.

Mr. HARE. Mr. de Bernardo, the survey that you have referenced today, it sounds to me—this is by the National Arbitration Forum—the evidence seems to be pretty one-sided here. I would argue that the survey is probably flawed because it is not scientifically conducted or reviewed. Lawyers received an e-mail allowing

them to fill out this survey so that it was self-selecting and biased because it only shows the point of view of the attorneys involved in arguing arbitration.

I wonder if you could maybe elaborate on this. In other words, I think, with all due respect, sir, you are quoting a survey that is statistically flawed. It is like polling people that do not exist or giving them the answer to the question and then they submit it.

Mr. DE BERNARDO. Yes, Mr. Hare. I quote the statistics. All the statistics are out there. Overwhelmingly, the statistics are in favor of ADR, as are overwhelmingly the constituencies that are involved and/or the public in general, 83 percent. So, you know, one of the reasons that we cite statistics is because statistics are in our favor. The research is in our favor. The research is——

Mr. HARE. Would it be possible, with all due respect, that they are in your favor because the only people that are answering this are the lawyers that received an e-mail asking them their opinion?

Mr. DE BERNARDO. You know, it is an ABA survey, and the American Bar Association conducts a survey, and 86 percent of their lawyers come out with an opinion, I think that is pretty conclusive.

Chairman ANDREWS. The gentleman's time has expired.

Mr. HARE. Thank you, Mr. Chair.

Chairman ANDREWS. Thank you very much.

The Chair recognizes the gentleman from Massachusetts, Mr. Tierney, for 5 minutes.

Mr. TIERNEY. Thank you, Mr. Chairman.

I want to thank all the witnesses for their testimony today.

I am concerned with this arbitration aspect only in the sense, as Mr. Foreman indicates, that people do not get to make a choice when it is the best time for them to make the choice, at the time of dispute. It seems to me that, you know, there are situations in the past where, you know, people that are at that point in time have to know what is at risk. They have to know.

And I think, you know, you can cite people saying that they are in favor of arbitration. I wonder how many of those people, because they were locked into arbitration ahead of time, actually understood how their final recovery compared to what they might have received had they been advised by an attorney as to punitive damages that they cannot get in arbitration and other things of that nature.

Mr. DE BERNARDO. You know, I am of the opinion—I said it in the testimony. I am saying it verbally—mandatory binding arbitration is decisively pro-employee. It is both pro-employee and pro-employer.

Mr. TIERNEY. Mr. Foreman, I want to go to you because I have a decisively different opinion of that, having practiced for over 20 years and having been on the other side of this, that most people when they come in have no idea what their anticipated recovery is..

Mr. DE BERNARDO. But the statistics that I gave, Representative, is those people who participated——

Mr. TIERNEY [continuing]. Going to get. I am going to continue, and I will ask if I really want anything else on this. But the fact of the matter is that they know what it is they stand to risk—it is a whole different world than if they go through the process—and

at they end they get something. And the statistics we see is they get about 20 percent of what they might be able to receive if they had gone to court in a lot of instances. That is serious business.

They do not get any discovery necessarily. The arbitrator generally does not have subpoena power. The record is not public, so it is very hard to go back and look and see where the arbitrators involved in this case have come down on previous cases like that. So I think there is a lot of difficulty in that.

And, Mr. Foreman, I would like your opinion on that, if I could.

Mr. FOREMAN. And the most recent statistics support exactly what you are saying, and they are cited in our materials, that right now the current statistic is, if you are a plaintiff in an employment discrimination suit and you go to jury trial, you have a win rate of about 36 percent, whereas, if you go to arbitration, your win rate is about 21 percent.

Mr. TIERNEY. Has it been your experience, you know, that the people sometimes go into arbitration if it is mandatory ahead of time without any appreciation for what their recovery might be had they gone through civil proceedings in court in front of a jury?

Mr. FOREMAN. Exactly. And one of the issues is the point we have made repeatedly that people just do not understand either what they are giving up or when they are giving it up, and they do not think they have any other choice in the matter.

Mr. TIERNEY. Are you familiar with any statistics as to the number of incidents where it is mandatory arbitration that required a venue to be at a place that is inconvenient to a plaintiff in that case?

Mr. FOREMAN. There is a whole litany of issues, and the cases repeatedly cover this, where you give up your right to a choice of forum, location, and ability to subpoena witnesses. Timeframes are significantly shortened. Again, that is a lot of the issues that need to be dealt with, and when Congress spent all this time passing these civil rights laws, my hope would be that you want them enforced in a way that they were passed.

Mr. TIERNEY. Mr. Serricchio, if I could change gears for a second, you indicated, in your answer to Mr. Kline's question, that you had two years in the service active duty, but 1 year is what you went in understanding you were going to have. But you never had a chance to answer as to whether or not your company compensated you for any portion of that while you were active duty.

Sergeant SERRICCHIO. For the first year, I was compensated. I was required to pay that back once I returned to work. So I was essentially given a loan. I would have to pay that back once I returned to work through money earned through commissions. When I returned to work, there was nothing to apply that to. The book of business was gone.

Mr. TIERNEY. Mr. Wood, based on what you heard from Mr. Serricchio's testimony on his case, do you think that he got a fair result, that his employer treated him appropriately under the law?

Mr. WOOD. Congressman, I do not know that I can testify or talk about what Mr. Serricchio's issue is.

Mr. TIERNEY. You do not think you can give an opinion based on the facts that he presented from his side?

Mr. WOOD. There are two sides on every story.

Mr. TIERNEY. Right, but now my question was not about two sides. My question was: Based on the facts as he stated them, if they were true, do you think that he got fair treatment under the law?

Mr. WOOD. Congressman, I think ultimately he got a loan of $90,000 for a time period that could have been totally unpaid under USERRA. His employer was not required to pay him anything under USERRA. They could have told him to go for 2 years and lived with nothing. He got a loan from his employer.

Having read the papers that have been submitted to the court, I think he got a very fair deal, yes.

Mr. TIERNEY. So you think his employer complied with the law?

Mr. WOOD. Based upon what I have seen of the court papers, yes, sir.

Mr. TIERNEY. Okay. Thank you.

I yield back, Mr. Chairman.

Chairman ANDREWS. Thank you very much.

The Chair recognizes the gentleman from Iowa, Mr. Loebsack, for 5 minutes.

Mr. LOEBSACK. Thank you, Mr. Chair. At this time, I do not have any questions, having just arrived, and I would like to yield my 5 minutes, if I may, to Ms. Sanchez.

Ms. SANCHEZ. I would like to thank the gentleman for yielding.

I am interested, Mr. Foreman, do you know what prompted the rise in the use of mandatory—or what the initial purpose of mandatory binding arbitration was? What context? Are you familiar with that?

Mr. FOREMAN. Well, if you go back in, I think, the Federal Arbitration Act was passed in 1925, and I think the purpose was really to deal with commercial arbitration disputes between businesses, but it has morphed into stealing rights away from victims of employment discrimination.

Ms. SANCHEZ. I could not agree with you more. The initial purpose of it was two sophisticated entities, two businesses, could enter into these mandatory binding arbitration contracts so that they could resolve disputes without going into the legal system, and it was meant for people of basically equal footing.

In your opinion, do you think that employers and employees who are seeking employment are on equal footing when they sit down to negotiate employment contracts?

Mr. FOREMAN. Absolutely not. I mean, unless you are walking in to get the coaching job for the Washington Redskins, no.

Ms. SANCHEZ. Thank you.

And I am wondering if you are familiar with the repeat player effect in mandatory binding arbitration?

Mr. FOREMAN. Yes, and the repeat player effect, again, is in some of the data that we cited in our materials. It is that employers tend to use the same arbitrators, and the more and more those arbitrators win, the employees win less and the amount they win is less.

Ms. SANCHEZ. And does that strike you as some kind of inherent conflict of interest if you are using the same person over and over again and—surprise, surprise—they seem to be ruling in your favor in a disproportionate amount of time?

Mr. FOREMAN. Absolutely, and, I mean, it is the old adage, you are not going to bite the hand that feeds you, and if you keep coming back, you are not going to get further arbitrations.

Ms. SANCHEZ. The issue we talked about a little bit of waiving substantive rights includes things like limited ability for discovery, limited ability for the plaintiff to subpoena witnesses, no jury trial. And, interestingly enough, is it not true that arbiters are not confined to follow the law when they render their decisions?

Mr. FOREMAN. Well, I think it is something, Congresswoman, that you mentioned earlier, is that the appeals rights from an arbitration decision are extremely limited.

Ms. SANCHEZ. So, if an arbitrator, for example, wanted to decide a case and decided, you know, "I think I am just going to flip a coin to determine who should win this case," in some instances, is it not true, it would be very difficult to appeal a decision of an arbitrator who basically flipped a coin to decide a case?

Mr. FOREMAN. It is extremely hard to overturn an arbitrator's decision as you move forward.

Ms. SANCHEZ. Thank you.

I think all of those things underscore some of the inherent trouble that I have dealing with mandatory binding arbitration, specifically when you are talking about oftentimes unsophisticated parties who are asked to sign these without really understanding or knowingly waiving all of these rights that are built into our legal system, but, unfortunately, are not explained to them at the time these contracts are entered into.

I had an experience not too recently where I went to a dentist because I had a crown come off of my tooth. I am a lawyer by training, and I am reading the form that I am supposed to fill out, and I had to agree to go to mandatory binding arbitration if I felt that there was less a degree of care in terms of dealing with the tooth problem. And when you have that kind of pain, you are almost willing to sign anything to get the dentist to see you, and I do not necessarily think even as a sophisticated attorney that I was on a level playing field with a doctor who is in a position of strength when you enter into bargaining. And that is just another illustration of some of these problems that I see.

Mr. Serricchio, I wanted to start by thanking you for your service. I have an employee actually in my district office, Patrick Rodriguez, who is an Iraqi veteran. He took a leave of absence because he was sent to Iraq. I know his wife and family very well, and I simply am stunned by Wachovia's attitude towards your leave and their basically saying that, you know, they are going to put you in a position where you are unable to support your wife and child, specifically after you responded to a call of duty on behalf of your country. And given your experience with Wachovia, I am interested in knowing what would you tell friends or colleagues who were considering joining the Guards or Reserves after your experience?

Sergeant SERRICCHIO. I would support joining the Guard and Reserve. I followed in my brother's footsteps who still is in active duty and over in Iraq now. That was my deciding factor. I would not discourage people against joining the Guard and Reserve.

With my situation, it came back to when I came back, out of the military and reinstated back into work, where the area became a problem, but as far as me suggesting people to join, I think it is a great opportunity. I think that the——

Ms. SANCHEZ. Would you ask them to consider what might happen to them when they come back after their service?

Sergeant SERRICCHIO. Well, I can speak from experience from people over in Saudi Arabia and people in Massachusetts that I served with that it was a concern for everybody, you know, being away for a year and then being away for a second year and then some people on to a third year, what life would be like after they returned. It is fearful for everybody, especially when you do come back, and you find that nothing is waiting for you.

But as far as suggesting anybody to join it, I think it is a great opportunity. I would not deter anybody from joining.

Ms. SANCHEZ. Thank you, and I thank you for your service.

I thank the gentleman for yielding.

Chairman ANDREWS. The gentleman's time has expired.

We would like to thank this panel for very thoughtful, comprehensive testimony. I think the committee will, unfortunately, ask you to contribute more because, as we continue our deliberations on these subjects, I know that each of the contributions you have made will be valuable.

Thank you very, very much for your participation.

I am going to ask if the members of the second panel would come forward, and in the interest of time, I am going to start to read their biographies, and we will get started with their testimony in just a moment.

Richard Foltin is the legislative director and counsel at the American Jewish Committee, AJC. Mr. Foltin previously served as the AJC's New York director of governmental affairs and was counsel for that office. Mr. Foltin received his bachelor's from New York University and his JD from the Harvard Law School.

Michael Gray is a partner in the law firm of Jones Day, focusing on representing corporate clients, including in employment discrimination lawsuits. He earned his BA from the University of Michigan in 1989 and his JD from Northwestern University in 1992 where he was on the editorial board of the Journal of International Law and Business.

Ms. Zainab Al-Suwaij is executive director of the American Islamic Congress, AIC, an organization she co-founded after the September 11 attacks.

Since then, Ms. Al-Suwaij has directed women's empowerment programs in Southern Iraq, lectured at Harvard, and participated in interfaith events around the world. She was named an ambassador of peace by the Interreligious and International Peace Council.

Ms. Al-Suwaij is the granddaughter of one of Basra's leading clerics, and was one of the few women that joined the failed 1991 intifada uprising against Saddam Hussein.

Welcome, and we are happy to have you with us.

Judy Goldstein is a speech therapist from New Jersey.

Good judgment, Ms. Goldstein. She is involved in volunteer projects in her community, working with special needs children to develop their speech and language skills.

James Standish is the director of Legislative Affairs, Public Affairs, and the Religious Liberty Department for the Seventh-Day Adventist Church. Mr. Standish is also deputy secretary general for the U.S. legislative affairs for the International Religious Liberty Association.

Mr. Standish received his bachelor's degree from Newbold College in England, his MBA from the Darden Graduate School of Business at the University of Virginia, and a JD from the Georgetown University Law Center.

Finally, Helen Norton is an associate professor of law at the University of Colorado Law School. Professor Norton has taught at Colorado since 2007. Before entering academia, Professor Norton served as deputy assistant attorney general for civil rights at the U.S. Department of Justice. She earned her BA from Stamford University in 1986 and her JD from the University of California at Berkeley.

We have assembled a very distinguished panel for which we are grateful.

I did want to note in advance that the primary author of the bill we have under consideration, Representative McCarthy, is with us, and a co-sponsor of that bill, Representative Souder, a Republican member of the committee, was scheduled to be with us, but has had flight problems because of weather.

And I have offered to both of our colleagues the chance to make a statement. I think Ms. McCarthy has declined that opportunity, as I understand it. She would rather hear from the witnesses. And Mr. Souder would also be welcome, however, as would Ms. McCarthy, to submit a written statement for the record in recognition of their leadership on this issue.

So we will begin with Mr. Foltin. I think you were in the audience and heard the ground rules a long time ago that your written testimony will be accepted without objection into the record.

We would ask you to summarize your written testimony in about 5 minutes. When the yellow light appears, it means you have a minute left to go. When the red light appears, we would ask that you summarize your testimony.

We are delighted that each of you would come from far-flung places to be with us today.

And, Mr. Foltin, we will start with you.

STATEMENT OF RICHARD FOLTIN, LEGISLATIVE DIRECTOR AND COUNSEL, AMERICAN JEWISH COMMITTEE

Mr. FOLTIN. Mr. Chairman, Ranking Member Kline, members of the subcommittee, thank you for this opportunity to testify on the Workplace Religious Freedom Act, important bipartisan civil rights and religious liberty legislation, introduced by Representatives Carolyn McCarthy and Mark Souder, and we are grateful for their championing of this issue.

My name is Richard Foltin. I serve as legislative director and counsel for the American Jewish Committee, and I have the privilege of serving also as co-chairman, together with my co-panelist

James Standish, of the coalition promoting passage of the Workplace Religious Freedom Act, a broad coalition of over 40 religious and civil rights groups that span the political and religious spectrum, reflecting the robust diversity of American religious life.

With the permission of the Chair, I would like to offer for the record a letter of support signed by a number of organizations supporting passage of WRFA.

Chairman ANDREWS. Without objection.

[The information follows:]

Organizations Supporting the Workplace Religious Freedom Act

Agudath Israel of America
American Jewish Committee
American Jewish Congress
Americans for Democratic Action
American Islamic Congress
American Values
Anti-Defamation League
Baptist Joint Committee on Public Affairs
Bible Sabbath Association
B'nai B'rith International
Center for Islamic Pluralism
Central Conference of American Rabbis
Christian Legal Society
Church of Scientology International
Concerned Women for America
Council on Religious Freedom
Family Research Council
General Board of Church and Society, the United Methodist Church
General Conference of Seventh-day Adventists
Guru Gobind Singh Foundation
Hadassah—WZOA
Institute on Religion and Public Policy
Interfaith Alliance
International Association of Jewish Lawyers and Jurists
International Commission on Freedom of Conscience
International Fellowship of Christians and Jews
Islamic Supreme Council of America
Jewish Council for Public Affairs
Jewish Policy Center
NA'AMAT USA
National Association of Evangelicals
National Council of the Churches of Christ in the U.S.A.
National Jewish Democratic Council
National Sikh Center
North American Council for Muslim Women
North American Religious Liberty Association
Presbyterian Church (USA)
Rabbinical Council of America
Religious Action Center of Reform Judaism
Republican Jewish Coalition
Sikh American Legal Defense Education Fund
Sikh Council on Religion and Education
Southern Baptist Convention, Ethics and Religious Liberty Commission
Traditional Values Coalition
Union of Orthodox Jewish Congregations
Union for Reform Judaism
United Church of Christ
Office for Church in Society
United States Conference of Catholic Bishops
United Synagogue of Conservative Judaism

Mr. FOLTIN. As you know, current civil rights law defines the refusal of an employer to reasonably accommodate an employee's religious practice, unless such accommodation would impose an undue hardship, as a form of religious discrimination.

This standard has been so weakened by the fashion in which it has been interpreted by the courts as to needlessly force upon religiously observant employees a conflict between the dictates of religious conscience and the requirements of the workplace.

The good news, however, is that since the problems in this area turn on judicial interpretation of legislation, rather than constitutional doctrine, they are susceptible to correction by the U.S. Congress, and that is what the Workplace Religious Freedom Act is intended to do.

Instead of the not more than de minims standard established by the Supreme Court in 1977, WRFA would define "undue hardship" as an action requiring significant difficulty or expense and would require that to be considered an undue hardship, the course of accommodation must be quantified and considered in relation to the size of the employer.

WRFA would also require that to qualify as a reasonable accommodation, an arrangement must actually remove the conflict. The accommodation might, of course, constitute an undue hardship, but a toothless and confusing definition of "reasonable accommodation" should not be utilized to avoid engaging in undue hardship analysis.

Finally, in order to address issues raised at an earlier point by the business community, WRFA would add to existing religious accommodation law with clarifying language a provision that an employer need not provide a reasonable accommodation if, as a result of the accommodation, the employee will not be able to fulfill the essential functions of the job.

As under the current interpretation of Title VII, WRFA does not give employees a blank check to demand any accommodation in the name of religion and receive it. Rather, it restores the protection Congress intended for religious employees in enacting the 1972 amendment by adjusting the applicable balancing test in the fashion that still gives substantial regard to the legitimate needs of business, even as it somewhat levels the playing field for an employee in need of accommodation.

The factors that WRFA sets forth for determining what is an undue hardship are designed to make the determination context specific so that a relatively small employer might well not have to provide an accommodation, where a larger employer would have to do. Moreover, as an amendment to Title VII, WRFA simply does not apply to truly small employers with fewer than 15 employees.

Concerns have been raised that implementation of WRFA will lead to material adverse impacts on third parties. Those concerns have risen primarily in the context of two types of situations, that an employee will cite religious beliefs as a justification for harassing fellow employees perhaps on the basis of their sexual orientation and as well that because an employee asserts a religious concern about being involved in reproductive health care services that third parties would be denied essential services.

As an organization that has a proud history of vigorous support for both reproductive rights and measures to protect against discrimination on the basis of sexual orientation—and there are a number of other such organizations in our ideologically diverse coalition—the American Jewish Committee would not be supporting WRFA if we thought that it would lead to such baleful results.

Nothing in WRFA will alter the fact that courts are quick to recognize that workplace harassment imposes significant hardship on employers in various ways, and, similarly, nothing in WRFA will change the balancing test that courts will have to engage in to assure that an employee's religious objections to particular duties does not result in a denial or, for instance, an abortion, necessary pharmaceuticals, or police protection for abortion clinics.

The courts clearly take impact on third parties very seriously as an element to undue hardship and, again and again, when these kinds of concerns arise, their analysis has not turned on the de minims standard. Moreover, the assertion of baleful results will flow from strengthening federal protections against religious discrimination are also without basis in the experience of prior efforts to enhance antidiscrimination law. For instance, in the law enacted by New York State in 2002 which strengthened its religious accommodation provisions.

Chairman ANDREWS. Mr. Foltin, could we just ask you to summarize?

Mr. FOLTIN. Sure.

In conclusion, conjectural concerns unbuttressed by experience should not be allowed to override the very real need to remedy the harm faced by religious employees every day.

Thank you.

[The statement of Mr. Foltin follows:]

Prepared Statement of Richard T. Foltin, Legislative Director and Counsel, Office of Government and International Affairs, the American Jewish Committee

Mr. Chairman, thank you for this opportunity to testify before the House Education and Labor Subcommittee on Health, Employment, Labor and Pensions on the Workplace Religious Freedom Act, important civil rights legislation introduced as H.R.1431 by Representatives Carolyn McCarthy and Mark Souder.

And thank you, as well, Representatives McCarthy and Souder, for bringing this crucial religious liberty and antidiscrimination legislation to the fore. Your bipartisan effort sends exactly the right signal—that the effort to safeguard religious liberty and fight against religious discrimination is one that should, and must, bring together Americans from a broad range of political and religious persuasions.

My name is Richard T. Foltin. I serve as Legislative Director and Counsel in the Office of Government and International Affairs of the American Jewish Committee. The American Jewish Committee was founded in 1906 with a mandate to protect the civil and religious rights of Jews. Through the years, AJC has been a vigorous proponent of the free exercise of religion, not only for Jews, but for people of all faiths.

I also have the privilege of serving as co-chairman—together with James Standish, legislative director of the General Conference of Seventh-day Adventists—of the Coalition for Religious Freedom in the Workplace. This broad coalition of over forty religious and civil rights groups—spanning the political spectrum and reflecting the robust diversity of American religious life—has come together to promote the passage of legislation to strengthen the religious accommodation provisions of Title VII of the Civil Rights Act of 1964. A list of the organizations comprising the coalition is appended to my testimony.

Current civil rights law defines the refusal of an employer to reasonably accommodate an employee's religious practice, unless such accommodation would impose an undue hardship on the employer, as a form of religious discrimination. But this standard has been interpreted by the courts in a fashion that places little restraint on an employer's ability to refuse to provide religious accommodation, needlessly forcing upon religiously observant employees a conflict between the dictates of religious conscience and the requirements of the workplace.

The Workplace Religious Freedom Act (WRFA) will promote the cause of protection of the free exercise of religion just as have two other bipartisan initiatives, the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), enacted into law in 1993 and 2000, respectively. WRFA is a similar response to the failure of the Supreme Court, and of lower courts following the high court's lead, to give due regard to the importance of accommodation of religious practice in a heterogeneous society.

The Need for WRFA

Why is the Workplace Religious Freedom Act necessary? After all, in 1972 the U.S. Congress amended the Civil Rights Act of 1964 so as to define as a form of religious discrimination the failure of an employer to reasonably accommodate an

employee's religious observance unless such accommodation would impose an undue hardship on the employer's business.[1] In so doing, Congress properly recognized that the arbitrary refusal of an employer to accommodate an employee's religious practice is nothing more than a form of discrimination. Unfortunately, this standard, set forth in section 701(j) of Title VII (42 U.S.C. section 2000e(j)), although appropriate on its face, has been interpreted by the Supreme Court and lower courts in a fashion that makes it exceedingly difficult to enforce an employer's obligation to provide religious accommodation.

The constricted reading of section 701(j) is no small matter. RFRA and RLUIPA were enacted by Congress in order to extend important protections to all Americans from undue government encroachment on their religious liberties. But for many religiously observant Americans the greatest peril to their ability to carry out their religious faiths, on a day-to-day basis, may come in the workplace.

Of course, many employers recognize that both they and their employees benefit when they mutually work together to find a fit between the needs of the workplace and the religious obligations of the employee. But it is not always so. In too many cases, employees who want to do a good job are faced with employers who will not make reasonable accommodation for observance of the Sabbath and other holy days.[2] Or employers who refuse to make a reasonable accommodation to employees who must wear religiously-required garb, such as a yarmulke, a turban or clothing that meets modesty requirements.[3] And the issues of holy day observance and religious garb, while accounting for a substantial portion of religious accommodation cases, far from exhaust the situations in which an employee is faced with an untenable choice because of an employer's failure to provide a reasonable accommodation.

Based on figures released by the Equal Employment Opportunity Commission, the number of claims of religious discrimination in the workplace filed for the fiscal year ending on September 30, 2006, as compared to the fiscal year ending on September 30, 1992, reflect a startling increase of over 75 percent. During the same period, by comparison, claims involving racial discrimination declined slightly.

Behind the filing of each claim is the story of an American forced to choose between his or her livelihood and faith. Frequently, those who put their faith first suffer catastrophic losses, including their homes, their health insurance, their ability to help their children through college, and, in some particularly sad situations, their marriages. Where employers have no good reason for refusing to make religious accommodation, Americans should not face such a harsh choice.

One of the contributing factors to this dramatic rise in claims is the weakness of the accommodation provisions as currently written. Under current law, there is little incentive for recalcitrant employers to accommodate the religious beliefs of their employees. This does not deter people of faith in the workplace from asserting their rights, however, because many of them are unwilling to compromise their conscience no matter what the legal ramifications might be.

But there are other factors behind the increase in religious discrimination claims as well. These include the movement toward a twenty-four-hours-a-day/seven-days-a-week economy, with consequent conflict with religious demands for rest and worship on Saturdays, Sundays, or holidays; our nation's increasing diversity, marked by a broad spectrum of religious traditions, some of which may clash with workplace parameters that do not take into account the religious observances of immigrant communities; latent animosity toward some religious traditions after the September 11 attacks, a phenomenon evidenced by a particularly severe spike in religious claims after the attacks, when Sikh and Muslim Americans faced greater hostility at work; and a growing emphasis on material values at the expense of spiritual ones, with some employers refusing to see any adjustment in workplace requirements to allow for religious practices.

To be sure, beginning in the 1990s both the EEOC and the Justice Department have evidenced a commendable increase in attention to religious discrimination cases, including cases premised on an employer's failure to provide an appropriate accommodation of religious practice. But the government's ability to bring those cases successfully is necessarily limited by the strength of the underlying law. And the claims brought at the federal level are but the tip of the iceberg. Many such claims go through local or state processes instead. And we will never know of the many people who do not bring claims having been advised, whether by an enforcement agency or by private counsel, that the present law leaves them with no—or a vanishingly small chance of—recourse * * * and, therefore, to the choice of violating a religious precept or giving up a source of livelihood.

Hardison and Its Progeny

The seminal Supreme Court case in this area is Trans World Airlines v. Hardison, 432 U.S. 63 (1977). Larry Hardison was a member of a seventh-day denomination,

the Worldwide Church of God, who was discharged by Trans World Airlines because he refused to work on Saturdays in his position as a clerk at an airline-maintenance facility that required staffing 24 hours per day, 365 days per year. The U.S. Court of Appeals for the Eighth Circuit ruled that TWA had not provided an adequate religious accommodation. TWA, joined by the employees' collective-bargaining representative, filed an appeal with the Supreme Court contending "that adequate steps had been taken to accommodate Hardison's religious observances and that to construe the statute to require further efforts at accommodation would create an establishment of religion contrary to the First Amendment of the Constitution." The Court did not reach the constitutional question; it determined, instead—in a 7-2 decision—that anything more than a de minimis cost to an employer would be an "undue hardship" for purposes of section 701(j), and found that the proposed accommodations would have imposed such a cost. The Court also found that TWA had made reasonable efforts at accommodation.

Hardison had proposed several proposed accommodations to his employer, two of which were found by the Court of Appeals for the Eighth Circuit to be reasonable: "TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, * * * TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages." But the high court rejected "[b]oth of these alternatives [because they] would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages. To require more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84.

Although Justice Marshall's dissent in Hardison, joined by Justice William Brennan, argues that Trans World Airlines had not satisfied its obligation to reasonably accommodate even under the "more than a de minimis cost" definition of "undue hardship," its more crucial point is that the Court's reading of section 701(j) reflects a determination by the Court that the Congress, in providing in the Civil Rights Act that an employer must make reasonable accommodation for religious practice, did "not really mean what it [said]." 432 U.S. at 86, 87. Justice Marshall went on to state:

An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise. 432 U.S. at 87. In other words, the Court's reading of section 701(j), in particular the de minimis interpretation of "undue burden," so vitiates the obligation to reasonably accommodate as to result in "effectively nullifying it." 432 U.S. at 89.[4]

The history of religious accommodation litigation since 1977 bears out this vision. It would be an overstatement to say that employees seeking a reasonable accommodation of their religious practices never prevail in court, to say nothing of the many whose cases we never hear about because they and their employers work out an accommodation amicably. But a brief overview demonstrates that for the most part, to borrow the title of one law review article on the subject, "heaven can wait."

Thus, one might expect a "reasonable accommodation" to be one that actually removes the conflict with religious practice, with employers then required to show an "undue hardship" before being relieved of the obligation to provide such an accommodation. To be sure, courts have in some instances interpreted the requirement of reasonable accommodation to mean just that. See Cosme v. Henderson, 287 F.3d 152, 159 (2d Cir. 2002); Wright v. Runyon, 2 F.3d 214, 217 (7th Cir. 1993), cert. denied, 510 U.S. 1121 (1994). Nevertheless, there have also been disturbing cases in which courts have suggested that an accommodation of religious practice may be considered "reasonable" even where it would force an employee to compromise his or her religious beliefs or face termination. Thus, courts have held that employees' rights under collective bargaining agreements or other "neutral" shift-allocation procedures are, in of themselves, reasonable accommodations even when those agreements make absolutely no provision for employee religious practices that may come into conflict with the requirements of the workplace. See Mann v. Frank, 7 F.3d 1365 (8th Cir. 1993); Cook v. Chrysler Corp., 981 F.2d 336 (8th Cir. 1992), cert. denied, 508 U.S. 973 (1993). Just last month, the Eighth Circuit reaffirmed this troubling principle, holding in Sturgill v. UPS, 2008 W.L. 123945 (Jan. 15, 2008), that even absent "undue hardship" an employer does not have an obligation to offer an accommodation that resolves an employee's religious conflict.

But it is in the application of the Hardison Court's interpretation of "undue hardship" that religiously observant employees have most often come to grief. The absence of nontrivial economic cost to employers has not prevented the courts from finding, on the basis of quite dubious rationales, that the provision of a reasonable accommodation will amount to an undue hardship. In one case, Mohan Singh—a Sikh forbidden by his religious precepts from shaving his facial hair except in medical emergencies—applied for the position of manager at a restaurant where he was already employed, but he was denied the position because he would not shave off his beard. When the Equal Employment Opportunity Commission brought a religious discrimination claim on Mr. Singh's behalf, a federal district court ruled that "relaxation" of the restaurant's grooming standards would adversely affect the restaurant's efforts to project a "clean-cut" image and would make it more difficult for the restaurant to require that other employees adhere to its facial hair policy. EEOC v. Sambo's of Georgia, 530 F. Supp. 86 (N.D.Ga. 1981).

Twenty-five years later, another federal district court, this time sitting in Massachusetts, ruled that it would be an undue hardship to require the Jiffy Lube automobile lubrication service to allow a Rastafarian who did not shave or cut his hair for religious reasons to work where he was visible to the public, compelling him to either work only in an underground "lower bay" or lose his job. Brown v. F.L. Roberts & Co, Inc., 419 F.Supp.2d 7 (D. Mass. 2006). Jiffy Lube had instituted a new policy that all employees making contact with the public should be well-groomed in order to promote the company's desired public image. The district court's opinion reflected an apparent discomfort with the decision even as it asserted that "it is compelled by controlling authority." The court commented:

[I]t is a matter of concern when the balance appears to tip too strongly in favor of an employer's preferences, or perhaps prejudices. An excessive protection of an employer's "image" predilection encourages an unfortunately (and unrealistically) homogeneous view of our richly varied nation. Worse, it places persons whose work habits and commitment to their employers may be exemplary in the position of having to choose between a job and a deeply held religious practice. 419 F.Supp.2d at 19.

Hardison also held that the existence of seniority provisions in a collective bargaining agreement serves as a basis to find undue hardship in the granting of an accommodation because, for instance, to allow the employee his Sabbath off would be in derogation of the seniority rights of another employee. The deference to seniority rights is unremarkable in light of Section 703(h) of Title VII (42 U.S.C. section 2000e-2(h)), which makes clear that "the routine application of a bona fide seniority system [i.e., without intention to discriminate because of race, color, religion, sex, or national origin] would not be unlawful under Title VII." Teamsters v. United States, 431 U.S. 324 (1977). But, all too often, the conclusion is reached that Section 703(h) bars an accommodation without further inquiry as to whether the bargaining representative might have been enlisted in a search for voluntary swaps or whether an exemption might be sought to provisions of the collective bargaining agreement that seem to stand in the way of an amicable arrangement (i.e., an arrangement that does not require a senior employee to give up his or her right not to work on a particular day).

The Supreme Court's lead in restrictively reading section 701(j) has been reflected in lower court rulings on other aspects of how that provision is to be applied. In Brener v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1982), Marvin Brener, a hospital staff pharmacist and Orthodox Jew, asked his supervisor to arrange his shift so that he would not have to work on Saturday, his Sabbath, or on Jewish holidays, such as Rosh Hashanah and Yom Kippur. Though granting the request at first, the hospital eventually refused, arguing that accommodation of Mr. Brener's religious practice posed a "morale problem" because other pharmacists were complaining about this "preferential treatment." Brener—scheduled to work on a day that his faith forbade him to—was forced to resign. He sued, but lost. In its ruling, a federal court of appeals held that it is the employee's, rather than the employer's, duty to arrange job swaps with other employees to avoid conflict with religious observance.[5] But an employer's inquiry is far more likely to be given serious consideration by fellow workers. Further, the employer is better situated to know which of the other employees is likely to be receptive to a request to adjust schedules. Conversely, once the employer appears indifferent to the request for accommodation, other employees may be less likely to cooperate. In short, placing the onus for arranging job swaps on an employee works to insulate an employer from fulfilling its obligation to avoid discrimination, while placing a discouraging—even debilitating—burden on the employee.

Finally, in Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986)—the only case besides Hardison in which the Supreme Court has addressed the religious ac-

commodation provisions of Title VII—the High Court found that "any reasonable accommodation by the employer is sufficient to meet the obligation to accommodate" and that the employer could refuse alternatives that were less onerous to the employee, but still reasonable. But even as this holding affords the employer the discretion to choose the reasonable accommodation most appropriate from its perspective, two principles should apply—first, the accommodation should actually remove the conflict (which was the case in Philbrook but not, as has been noted above, in other cases), and, second, an accommodation should not treat a religious practice less favorably than other, secular practices that are accommodated.

The Workplace Religious Freedom Act

The constrictive readings of section 701(j) discussed above are inconsistent with the principle that religious discrimination should be treated fully as seriously as any other form of discrimination. The civil rights of religious minorities should be protected by interpreting the religious accommodation provision of Title VII in a fashion consistent with other protections against discrimination to be found elsewhere in this nation's civil-rights laws. Since the problems in this area turn on judicial interpretation of legislation, rather than constitutional doctrine, they are susceptible to correction by the U.S. Congress. That is what the Workplace Religious Freedom Act is intended to do.

Instead of the "not more than de minimis" standard, WRFA would define "undue hardship" as an "an action requiring "significant difficulty or expense" and would require that, to be considered an undue hardship, the cost of accommodation must be quantified and considered in relation to the size of the employer. In this respect, it would resemble (although not be identical with) the definition of "undue hardship" set forth in the Americans with Disabilities Act. The ADA presents, in fact, an apt analogy to the provisions of Section 701(j). As it later did for Americans with disabilities, the U.S. Congress determined in enacting Section 701(j) that the special situation of religiously observant employees requires accommodation so that those employees would not be deprived of equal employment opportunities.

Crucially, WRFA would require that to qualify as a reasonable accommodation an arrangement must actually remove the conflict. This would put to rest the notion that a collective bargaining agreement or any other neutral arrangement, or an "attempt to accommodate," that fails to accommodate a religious practice might itself be viewed as a "reasonable accommodation." The accommodation might, of course, constitute an undue hardship, but a vitiated definition of reasonable accommodation should not be utilized to avoid engaging in undue hardship analysis.

WRFA would also make clear that the employer has an affirmative and ongoing obligation to reasonably accommodate an employee's religious practice and observance. This provision does not in of itself alter the standard for what is a reasonable accommodation or an undue hardship. It does, however, require that all to whom section 701(j) applies bear the responsibility to make actual, palpable efforts to arrive at an accommodation.

On the specific issue of collective bargaining arrangements, nothing in the bill purports to override section 703(h) of Title VII. It would, however, encourage religiously observant employees and their employers, and a collective bargaining representative where applicable, to seek amicable arrangements within the context of an existing seniority system, perhaps through voluntary shift swaps or modifications of work hours.

WRFA also explicitly puts to rest any suggestion in the Philbrook case that it is appropriate to forbid the use of personal leave time for religious purposes when that leave is available for other, secular purposes.

Finally, in order to address concerns raised by business interests, WRFA—tracking an element of the Americans with Disabilities Act—would add to existing religious accommodation law, with certain clarifying language, a provision that an employer need not provide a reasonable accommodation if, as a result of the accommodation, the employee will not be able to fulfill the "essential functions" of the job. Once it is shown that an employee cannot fulfill these functions, the employer is under no obligation to show that he or she would incur an undue hardship were a reasonable accommodation to be afforded.

Concerns about Impact on Business

As was just referenced, concerns have been raised that WRFA will impose an unmanageable burden on employers. But the concept of religious accommodation is not, as we have seen, a new one under federal civil rights law. And, as under the current interpretation of Title VII, WRFA does not give employees a "blank check" to demand any accommodation in the name of religion and receive it. Rather, it restores the protection Congress intended for religious employees in enacting the 1972

amendment by adjusting the applicable balancing test in a fashion that still gives substantial regard to the legitimate needs of business standard even as it somewhat levels the field for an employee in need of accommodation.

In this regard, it is well to note that, as an amendment to Title VII and therefore subject to its restrictions, WRFA does not apply to employers of less than 15 full time employees. Moreover, the factors that it sets forth for determining what is an "undue hardship" are designed to make the determination context specific so that a relatively small employer—of, say, 100 employees, might well not have to provide an accommodation where a larger employer of 1,000 would have to do so.

It is commonly argued that fakers will seek illegitimate accommodations based on fraudulent beliefs. But the fact is that courts have for decades engaged in assessing the sincerity of asserted religious beliefs. Indeed, under the Supreme Court's 1965 decision in United States v. Seeger, 380 U.S. 163 (1965), the threshold question of sincerity as to religious belief must be resolved as a question of fact. In practical terms, the problem of insincerity in the realm of religious accommodation in the workplace is particularly small. People who do not have a genuine and sincere reason to ask for an accommodation are simply unlikely to risk employer displeasure and social stigma by doing so. In addition, religious accommodation cases are almost always brought after a worker has been fired. Given the economic disincentive to bring such suits, it would be odd indeed for an individual to be fired and then spend financial resources to vindicate a religious belief she doesn't sincerely hold.

Historical precedent indicates that bogus claims are much more prominent in the minds of WRFA opponents than in reality. New York State has had a holy-day accommodation law for many years, yet there is no record of people bringing cases for failure to honor their "Church of the Super Bowl" or "Mosque of the Long Weekend." For that matter, there has been no epidemic of these fanciful claims under existing federal religious accommodation law.

Concerns about Impact on Third Parties

Another set of concerns has been raised that implementation of WRFA will lead to material adverse impacts on third parties. These concerns arise primarily in the context of two types of hypothetical situations—that WRFA will be used to protect those who would cite religious beliefs as a justification for harassing gays in the workplace, and that WRFA will be used to limit access to reproductive healthcare. These concerns are based on an unreasonable and untenable reading of the proposed law under which claims for accommodations that would have material adverse impact on third parties that have, until now, lost virtually without exception, might have different results should WRFA be passed. As an organization that supports both reproductive rights and measures to protect against discrimination on the basis of sexual orientation, the American Jewish Committee would not be supporting WRFA if we thought that it would lead to such baleful results.

A central component of WRFA, as is the case under current accommodation law, is its balancing test, albeit with a modification of the operative definitions of "reasonable accommodation" and "undue hardship." Nothing in that change in definition will alter the fact that courts are quick to recognize that workplace harassment imposes a significant hardship on employers in various ways: Permitting harassment to proceed unchecked opens the employer up to lawsuits based on the employer maintaining a hostile work environment; the loss of productivity and collegiality caused by attacks on colleagues constitutes a significant burden; and the cost of recruiting and hiring new employees to replace those who leave due to harassment also meets the significant burden test.

Thus, in Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012 (4th Cir. 1996), cert. denied, 522 U.S. 813 (1997), an appellate court dismissed the religious accommodation claim brought by an employer who was fired for writing accusatory letters to co-employees. The court reasoned, "where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place. If [the employer] had the power to authorize [the plaintiff] to write the letters, the company would subject itself to possible suits from [other employees] claiming that [the plaintiff's] conduct violated their religious freedoms or constituted religious harassment." The court considered the proposition that the plaintiff's conduct constituted an undue hardship to be self-evident, and did not find it necessary to analyze the claim in terms of the de minimis standard.

Similarly, in Peterson v. Hewlett-Packard, 358 F.3d 599 (9th Cir. 2004), a court of appeals unequivocally decided that Title VII provided no protection from termination for a Christian employee who was fired when he refuse to remove from his cubicle a quote from the Bible condemning homosexuality. Both the lower court and the appeals court had no problem at all finding against the plaintiff on the Title

VII claim he brought for failure to provide a religious accommodation. The Ninth Circuit did not discuss the standard the employer had to meet, but rather focused on the burden on fellow employees, finding, in effect, that religious beliefs cannot insulate actions that demean or degrade other employees. There is nothing in WRFA that would change this analysis. Moreover, it is significant that there is a paucity of Title VII religious accommodation case involving the issue of harassment of gays in the workplace.

Concerns have also been raised that WRFA would permit an emergency-room nurse to walk away from a woman in need of an emergency abortion on the grounds that the nurse's participation in the procedure would violate his or her religious precepts—as if any court hearing a case brought by the nurse against an employer for unfair dismissal would likely find that it is not a significant burden on the hospital when its employees refuse to treat patients in need of emergent care. If employees leaving patients suffering isn't a significant burden on a hospital, one is forced to ask, what is? If facing significant malpractice liability from the patient for substandard care isn't a significant burden, what is? If risking the hospital's accreditation isn't a significant burden, what would be?[6]

The same analysis plays out in the context of the claim that WRFA would permit policemen to refuse to guard abortion clinics. If a policeman had a religious objection to guarding an abortion clinic, he could, under WRFA, ask to be reassigned. His employer would be required to facilitate such a reassignment, but only if by so doing it did not incur a significant burden. Sometimes accommodation would simply not be practicable. Does this mean that the abortion clinic would remain unguarded? No. In such circumstances the policeman would have to accept his assignment or accept the consequences of disobeying an order. Nothing in WRFA comes close to leaving abortion clinics exposed.

And, finally, it is claimed that WRFA would somehow empower pharmaceutical employees to refuse to fill prescriptions for birth control medication or for emergency contraception, even at the cost of the patient's prescription not being filled at all. This concern was raised in the context of a case in which a CVS pharmaceutical employee refused to fill a prescription for birth control pills because the pharmacist did not "believe" in birth control. After some initial confusion, CVS confirmed that the refusal was not in line with company policy, which requires that a pharmacist who refuses to dispense medication based on personal ideology must make sure that the patient's prescription is filled anyway, either by another pharmacist at that location or by another pharmacy in the area. In a similar vein, an Eckerd pharmacy fired a pharmacist who refused to fill a rape victim's prescription for emergency contraception.

As with existing Title VII provisions, WRFA provides a floor in terms of the extent to which an employer must accommodate an employee's religious practice, not a ceiling. Thus, WRFA has no role to play as to whether a pharmacy will require—as CVS and Eckerd do—that prescriptions be filled, regardless of an employee's personal beliefs. But, crucially, as in the context of abortion services, once a pharmacy does have such a policy, a fair reading of the "undue hardship" standard under WRFA would lead to the conclusion that the firing of an employee for not filling the prescription would be sustained if no reasonable accommodation such as having another employee fill the prescription in a timely fashion were available. Given the implications for the pharmacy of having a customer whose prescription is not filled, the failure to fill the prescription would constitute a palpable significant difficulty or expense.

In sum, the courts clearly take impact on third parties very seriously as an element of undue hardship and, again and again, their analysis does not turn on the de minimis standard. Indeed, the cases cited by opponents of WRFA often turn on aspects that have nothing to do with the "undue hardship" standard at all.[7]

Moreover, the assertion that baleful results will flow from strengthening federal protections against religious discrimination are also without basis in the experience of prior efforts to enhance antidiscrimination law. In 2002, New York State amended the religious accommodation provisions of its Human Rights Law, found at New York Executive Law Section 296(10), in a fashion similar in material respects to WRFA.[8] Earlier, in 1997, President Bill Clinton adopted guidelines on the treatment of religion in the federal workplace that functionally strengthened the religious accommodation standards of that workplace.

In a state as large and diverse as New York, and given the speed with which information travels in this Age of the Internet, we would expect to have heard if the predicted onslaught of such claims were occurring, much less that these claims were prevailing. But there is no evidence that enactment of the 2002 amendments has led to the parade of horribles foretold by some critics of WRFA. As Eliot Spitzer, now Governor and then Attorney General of New York, stated in an op-ed appearing

in the Forward on June 25, 2004, "New York's law has not resulted in the infringement of the rights of others, or in the additional litigation that the ACLU [a WRFA critic] predicts will occur if WRFA is enacted. Nor has it been burdensome on business. Rather, it strikes the correct balance between accommodating individual liberty and the needs of businesses and the delivery of services. So does WRFA."

Thus, the suggestion that Congress should not pass WRFA because it will open the door to harassment and denial of essential medical treatment places a fanciful swatting at phantoms over the very real need to remedy the harm faced by religiously observant employees every day.

Why the "Targeted" Approach Will Not Work

It has been suggested that the way to deal with these concerns is to resort to a so-called "targeted" approach, under which Congress would single out particular religious practices—dress, grooming, holy days—for protection under the WRFA standard. But the "targeted" approach embraces a troubling notion—that certain religious practices are simply not worthy of even a day in court to establish whether accommodation of those practices can be afforded without significant difficulty or expense for the employer or third parties. Again, the AJC—joined by many of the organizations supporting WRFA—is committed to combating discrimination on the basis of sexual orientation and to reproductive rights. But we are also committed to a fundamental premise of our Constitution and our society, that it is not up to the government to prescribe orthodoxies of belief or practice, and that the religious beliefs and practices of those with whom we disagree on these (and other) fundamental matters should be accommodated if this can be done without harm to others.

Moreover, under the "targeted" approach as many as 25% of accommodation claims would be consigned by a Faustian bargain to the old, inadequate standard—all in order to ensure that a subset of those claims with little chance of success are eliminated from a miniscule improved chance of success.

Claims that would be eliminated from coverage a targeted application of the WRFA standard include:

- Jehovah's Witness employees who request to opt out of raising the flag and pledging allegiance at work;
- A Methodist attorney who requests accommodation not to work on tobacco litigation;
- A Quaker (Society of Friends) employee who requests to be transferred to a division that does not work on armaments;
- An Orthodox Jewish woman who requests permission not to shake the hands of male customers;
- A Hindu employee who requests permission not to greet guests with the phrase "Merry Christmas;"
- A Christian employee who requests to be assigned to work that does not involve embryonic research;
- A Muslim hospital employee who requests to be exempted from duty in which she would be present when a member of the opposite sex is unclothed.

While these examples provide an overview of some of the types of cases that would be omitted from coverage by WRFA were the targeted approach adopted, it is by no means designed to give the totality of cases. Indeed, the variety of religious beliefs is one of the factors that make our nation such a fascinating place to live. In addition, there are numerous relatively new religious groups in the United States. Many of these groups are relatively small and some are primarily made up of immigrants. As a result, they often are unaware of their rights under current law, and frequently do not have the resources to vindicate their rights in the courts. Thus, the reported cases almost certainly undercount the claims from these groups. To agree to a targeted bill is to agree to a lower protection for these groups without their having any input in the decision.[9]

WRFA provides that when it can be shown that accommodating a person of faith in the workplace proves significantly difficult or expensive, the accommodation need not be provided. Whether that difficulty arises due to disharmony caused by a religious employee harassing another employee or refusing to provide medical care when no reasonable accommodation can be made, or because accommodation of the religious employee would result in disfavoring fellow employees or other third parties in a host of other ways, the balancing test provides assurance that religious employees will not trample the rights of others in the workplace.

Constitutional Issues

Amendment of the law so as to provide a reading of Section 701(j) that affords meaningful protections for religiously observant employees is consistent with the Es-

tablishment Clause's requirement that government action not favor one religion over another, or religion over non-religion.

It has been suggested by some commentators that the reading of "undue hardship" to mean not more than de minimis difficulty or expense was necessary to avoid a reading of the accommodation provision that would have caused it to run afoul of the Establishment Clause. Although not explicitly invoking the Establishment Clause, Justice White—writing for the Court in Hardison—asserted that any construction of Title VII that was more protective of religious practice would mean that employees would be treated not on a nondiscriminatory basis but unequally on the basis of their religion. "* * * [T]he privilege of having Saturdays off would be allocated according to religious belief," he said in writing for the Court, "Title VII does not contemplate such unequal treatment."

But Justice Marshall's dissent in Hardison, joined by Justice Brennan, saw no constitutional problem in requiring employers "to grant privileges to religious observers as part of the accommodation process." Justice Marshall went on, "If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer." 432 U.S. at 91. He added in a footnote:

The purpose and primary effect of requiring such exemptions is the wholly secular one of securing equal economic opportunity to members of minority religions. * * * And the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of "sponsorship, financial support, and active involvement of the sovereign in religious activity," against which the Establishment Clause is principally aimed. 432 U.S. at 90-91, fn. 4. As we all know, Justices Marshall and Brennan were both resolute supporters of a strict reading of the Establishment Clause. Thus, it is particularly compelling that neither believed that the Constitution required a weak reading of section 701(j).

The case of Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), is distinguishable. In that case the Supreme Court struck down by a vote of 8-1, as a violation of the Establishment Clause, a Connecticut statute that gave employees the absolute right not to work on their respective Sabbaths. Writing for the Court, Chief Justice Burger said the state law imposed an excessive burden on employers, as well as on non-religious employees who also had "strong and legitimate" reasons for wanting to avoid having to work on the weekend. 472 U.S. at 710, fn.9. The opinion of the Chief Justice did not, however, address the question of the constitutionality of a less absolute approach to the issue of employee Sabbath observance.

In a concurring opinion, joined by Justice Marshall, Justice O'Connor agreed with the Court's decision, but stated also that "the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of Sabbath observance." She went on to note that "the statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees." 472 U.S. at 711 (O'Connor, J., concurring). Hence, in her view, the statute advanced religion in violation of the Establishment Clause. Importantly, Justice O'Connor distinguished the Connecticut statute from the religious accommodation provision of Title VII:

* * * a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. * * * Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only * * * Sabbath observance, I believe that an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice. 472 U.S. at 712.

Both prior to and subsequent to Thornton, a number of federal appellate courts have held the reasonable accommodation provisions of section 701(j) to be constitutional, reasoning that, under the tripartite analysis of Lemon v. Kurtzman, 403 U.S. 602 (1971), the requirement had a secular purpose (the elimination of religious workplace discrimination); a primary effect that neither advances nor prohibits religion; and does not lead to excessive government entanglement with religion. See, e.g., EEOC v. Ithaca Industries, Inc., 849 F. 2d 116 (4th Cir.), cert. denied, 488 U.S. 924 (1988); McDaniel v. Essex International, Inc., 696 F.2d 34 (6th Cir. 1982).

Left unaddressed by the courts, except for the views expressed by Justices Marshall and Brennan in their dissent in Hardison, is whether a standard more protective of religious observance than de minimis but not absolute, as was the Connecticut statute struck down in Thornton, would survive Establishment Clause scrutiny. In our view, it would. Turning to the Lemon analysis,[10] easing of the undue

hardship standard (and, indeed, the other aspects of the bill), so as to afford greater protection for employees serves the secular purpose of combating discrimination. Moreover, the parallels between WRFA and the Americans with Disabilities Act—albeit their provisions are not identical—demonstrate that the Congress will not be granting a religion a kind of protection not available to secular interests. The primary effect prong appears satisfied by the balancing of interests and non-absolute nature of the accommodation reflected in the bill. Finally, the excessive entanglement prong—subsumed in the primary effects prong by Agostini v. Felton, 521 U.S. 203 (1996)—has been invoked by the courts only in cases involving government monitoring of religious institutions that receive public funds.

An invalidation of WRFA on Establishment Clause grounds would be grounded in paradox; it would be to say that an assuredly valid government purpose of combating religious discrimination may be accomplished only by a reading of section 701(j) so circumscribed as to fail to afford religiously observant employees a genuine modicum of protection. Surely, that cannot be the constitutionally mandated result.

The Supreme Court's rulings in United States v. Lopez, 514 U.S. 549 (1995), and in City of Boerne v. Flores, 521 U.S. 507 (1997), among other decisions reflecting a change of the Court's approach to legislation enacted in reliance upon the Commerce Clause and section 5 of the Fourteenth Amendment, respectively, give rise to an understandable concern as to the prospects for WRFA should it be enacted.

Turning to the Boerne issue first, the Court went to significant lengths in that case to distinguish its decision striking down the Religious Freedom Restoration Act as applied to the states from earlier cases upholding the authority of the Congress under section 5 to enact the voting rights laws. To the extent the Civil Rights Act of 1964 is grounded in section 5, WRFA is simply a clarification of terms from Title VII of the 1964 act, as amended. In any event, Boerne relates to the question of whether WRFA will be enforceable against state and local governments. However, that issue may be resolved—and important as it is to afford stronger protections against religious discrimination to both public and private sector employees—even a WRFA whose reach is limited by an expansion of Boerne would still serve a crucial purpose.

In addition, and crucially, the 1964 Civil Rights Act is founded in the Commerce Clause. Lopez notwithstanding, Commerce Clause legislation remains valid so long as Congress has a rational basis for concluding that the regulated activity "substantially affects" interstate commerce. United States v. Lopez, 514 U.S. at 558-59. The prohibition on invidious discrimination in connection with employment is the sine qua non of legislation with respect to an activity that "substantially affects" interstate commerce. See Lopez, 514 U.S. at 559, citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 and, by implication, the rest of the Act) as an example of "congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."

Conclusion

Enactment of the Workplace Religious Freedom Act will constitute an important step towards ensuring that all members of society, whatever their religious beliefs and practices, will be protected from an invidious form of discrimination. The refusal of an employer, absent undue hardship, to provide reasonable accommodation of a religious practice should be seen as—and was intended by Congress in 1972 to be treated as—a form of religious discrimination. And religious discrimination should be treated fully as seriously as any other form of discrimination that stands between Americans and equal employment opportunities.

In assuring that employers have a meaningful obligation to reasonably accommodate their employees' religious practices, WRFA will restore to Title VII's religious-accommodation provision the weight that Congress originally intended. And, although necessarily framed as a strengthening of the legal protection to be afforded religiously observant employees, enactment of WRFA will, it is hoped, have a benefit that is not strictly legal. It may cause employees and employers to start talking to each other where they have not—employers may not think they now have to address issues of accommodation because they believe the law is on their side, and some employees may simply think they have no recourse. The true mark of this bill's success, when it becomes law, will be if there is less, not more, litigation over accommodation of religious practice.

We come to this hearing some two months before the Jewish holiday of Pesach (Passover). During that holiday, as at other times of the year, there are a number of days on which work is religiously proscribed. Too often a season that should be one of joy becomes, for Jews who observe the proscription on work, a period of anx-

iety and, sometimes, blighted careers as they face the possibility of losing their livelihood for following the dictates of their faith.

Nearly thirty years ago, Justice Thurgood Marshall concluded his dissent in Hardison by saying:

The ultimate tragedy [of this decision] is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today's decision is erased. 432 U.S. at 97. Perhaps we will come to look back on the hearing held today as the harbinger of the realization of Justice Marshall's hope—that the civil rights laws of this great nation will give due regard to the religious diversity that is one of its marks of pride.

ENDNOTES

[1] Section 701(j) of Title VII provides, with respect to the definition of "religion" as follows:

The term "religion" includes all aspects of religious observance and practice, as well, as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious practice without undue hardship on the conduct of the employer's business.

This language, in essence, codifies a 1967 Equal Employment Opportunity Commission guideline that provided a definition of "religion" for purposes of enforcement of the law prohibiting employment discrimination on the basis of religion. In enacting this provision, Congress modified the guideline so as to shift from the employee to the employer the burden of proving that the accommodation sought is not reasonable.

[2] E.g., Beadle v. City of Tampa, 42 F.3d 633 (11th Cir. 1995), cert. denied, 515 U.S. 1152, and Beadle v. Hillsborough County Sheriff's Dep't, 29 F.3d 589 (11th Cir. 1995), cert. denied, 515 U.S. 1128 (1995).

[3] E.g., United States v. Bd. of Education, 911 F.2d 882 (3d Cir. 1990).

[4] Justice Marshall's discussion of section 701(j)'s legislative history is worthy of note. Section 701(j) was introduced by Senator Jennings Randolph explicitly to rebut cases suggesting that "to excuse religious observers from neutral work rules would 'discriminate against * * * other employees' and 'constitute unequal administration of the collective-bargaining agreement.'[citing Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971)] * * * The primary purpose of the amendment, [Senator Randolph] explained, was to protect Saturday Sabbatarians like himself from employers who refuse 'to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.' [citing 118 Cong. Rec. 705 (1972)] His amendment was unanimously approved by the Senate on a roll-call vote [citing 118 Cong. Rec. 731 (1972)], and was accepted by the Conference Committee [cites omitted], whose report was approved by both Houses. 118 Cong. Rec. 7169, 7573 (1972). Yet the Court today, in rejecting any accommodation that involves preferential treatment, follows the Dewey decision in direct contravention of congressional intent." 432 U.S. at 89.

[5] The court also noted, in yet another example of the courts' restrictive reading of the undue burden standard, that the hospital was not obligated to accommodate Brener's religious observance if that would lead to "disruption of work routines and a lessening of morale among other pharmacists."

[6] See, in this regard, Shelton v. University of Medicine & Dentistry of New Jersey, 223 F.3d 220 (3d Cir. 2000) (opinion by Judge Scirica with Judges Alito and Aldisert concurring). While the nurse's claim was dismissed in that case for her failure to accept the hospital's proffer of a reasonable accommodation, the federal court of appeals asserted, in the context of a discussion of "undue burden," that "we believe public trust and confidence requires that a public hospital's health care practitioners—with professional ethical obligations to care for the sick and the injured—will provide treatment in time of emergency." 223 F.3d at 228. Nothing in this statement suggests that the court's analysis would be different in light of the change contemplated by WRFA.

[7] See, as to both propositions, Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470 (7th Cir. 2001) (case turns on employer's having offered a reasonable accommodation, not undue hardship issue); Parrott v. District of Columbia, 1991 WL 126020, 58 Empl. Prac. Dec. P 41,369 (D. D.C. 1991) (strongly worded discussion of the undue hardship that the requested accommodation would pose for employer suggests that WRFA standard would not have made a difference in result); Bruff v. N. Miss. Health Services, Inc., 244 F.3d 495 (5th Cir.) (similarly), cert. denied, 534 U.S. 952 (2001); Wilson v. U.S. West Communications, 58 F.3d 1337 (8th Cir. 1995) (case turns on employee's failure to accept a reasonable accommodation, not undue burden); Johnson v. Halls Merchandising, Inc., 1989 WL 23201 (W.D. Mo. 1989) (plaintiff's claim dismissed because the defendant attempted to reasonably accommodate plaintiff's religious practices but "plaintiff did not make any effort to cooperate with her employer or to accommodate her beliefs to the legitimate and reasonable interests of her employer, i.e., to operate a retail business so as not to offend the religious beliefs or non beliefs of its customers").

[8] New York's amended religious accommodation law is, to be sure, not identical with H.R.1431. Nevertheless, this New York law incorporates the most crucial aspect of H.R.1431—a heightened standard for determining whether a proposed religious accommodation will impose an "undue hardship."

The revised New York law incorporates two significant new elements. Firstly, subsection (a) of Section 296(10), as amended, explicitly extends the obligation of an employer to provide a reasonable accommodation of an employee's religious practice to any "sincerely held practice of his or her religion;" the prior law had referenced only holy day observance. Secondly, subsection (a),

as amended, goes on to provide that it is a discriminatory practice for an employer to require an employee or prospective employee "to violate or forego a sincerely held practice of his or her religion * * * unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business."

"Undue hardship" is defined by subsection (c)(1) to mean "an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)"—a definition that is similar to, although not identical with, the definition of "undue hardship" in WRFA. While WRFA does not include the parenthetical, the provision that an employer shall not be obligated to accede to "a violation of a bona fide seniority system" is consistent with the provisions of Section 703(h) of Title VII, which will continue to be applicable to federal religious accommodation cases if WRFA is adopted, as it is now. Further, the clause regarding "safe or efficient operation of the workplace" simply expands on the meaning of "significant difficulty or expense." Subsection (c)(1) goes on to list a number of factors to be considered in determining whether the accommodation constitutes "an undue economic hardship," a list which is, again, similar, but not identical, to the nonexclusive list to be found in WRFA.

[9] This carving up of religious claims into two different categories is both philosophically troubling and possibly constitutionally problematic, as it opens WRFA up to claims that it violates the Establishment Clause by privileging some religious beliefs over others. See Estate of Thornton v. Calder, Inc., 472 US 703 (1985).

[10] Although the continued vitality of the Lemon test is in doubt, it is useful to apply that analysis in this context because it is a restrictive reading of what government action is allowed pursuant to the Establishment Clause.

Chairman ANDREWS. Thank you very, very much.

Mr. Gray, welcome to the subcommittee.

Mr. GRAY. Thank you.

Good afternoon, Chairman Andrews, Ranking Member Kline, distinguished members of the committee. I wanted to thank you for the opportunity to speak to you today on this very important piece of legislation, as well as appreciate Chairman Andrews' initial thoughts of the careful deliberations that the committee intends to do on this amendment or potential amendment to Title VII of the Civil Rights Act of 1964.

As a former political science major and avid follower of the legislative process, I also just want to tell you what an honor it is to be here and to participate, albeit just a small part, in the legislative process.

Chairman ANDREWS. There are no small parts, only small witnesses, which you are not one, I am sure. [Laughter.]

STATEMENT OF MICHAEL GRAY, PARTNER, LABOR AND EMPLOYMENT PRACTICE, JONES DAY

Mr. GRAY. Well, I appreciate it, Chairman.

I am here on behalf of HR Policy Association, an association of chief human resource executives at 250 of the largest employers here in the United States. Our members have more than 12 million employees here in the United States and another 6 million abroad.

I am a partner at Jones Day, and I spend my days working with corporations—small, medium, and large—in trying to deal with the difficult regulations that confront them in the workplace.

We are here today to look at the act, and I am here to sort of bring some of the practicalities that corporations in the United States see on a day-to-day basis with respect to religious discrimination, religious accommodation, and the need for amendment to this very historic Civil Rights Act of 1964.

What we have seen in practice is that, contrary to what we have heard from some critics, Title VII actually is providing appropriate accommodation to employees and is in no need of repair.

The act before us today, WRFA, the Workplace Religious Freedom Act, really goes too far in trying to remedy problems, and when we take a look at the problems that are cited, what we find is that there are not the sort of widespread problems in the workplace that are not being remedied by avenues already provided under the Civil Rights Act.

For example, what we have seen in the workplace is two large sets of proposed accommodations. One falls into the category of dress and appearance, as well as days off. That is sort of the first category, something that employers tend to see each day.

The Tannenbaum study, which I cite, as well as a number of other points, in the written testimony talks about that nearly 80 percent of the responding corporations said that they have some type of days off provided, whether religious or not, for their employees. So what we are seeing is that employers see the issue and are currently addressing it.

Of course—and there are examples cited in everybody's testimony—there are times when corporations may not be doing the right thing, and there are adequate avenues for redress. One, employees can go to the EEOC. There is private litigation. Cases are cited in the testimonies of everybody sitting here today. And, also, the EEOC has been an advocate on behalf of potentially aggrieved employees.

We have also seen quite recently, in the cases brought by the EEOC, success where, if there is a situation where corporations are not providing the rights provided under Title VII, the courts are stepping in and providing redress, and we have actually had a couple of recent decisions on that point.

The act, I think, is a combination of both the rifle shot as well as the shotgun approach, and it is too difficult in our short time period to really get to all the issues, Mr. Chairman, but I do think the testimony lays out a number of the issues, and I just wanted to cite a couple more in my closing moments.

In trying to take the framework from the Americans with Disabilities Act and apply that to your religious context, there is not sort of a one-to-one correspondence. For example, the test set forth in WRFA would like you to sort of put an easy number on the cost of a potential accommodation.

Now that may be much easier. In fact, we have seen that both in cases and, frankly, my clients have seen that where if someone requires a new keyboard or a new backrest or someone to assist them, they are very quantifiable, or in the words of WRFA, identifiable.

But if you take that same context and you then apply it to the religious accommodation, it is much more difficult. All the recent examples, many of which are cited in the testimony, where people's acts affect others in the workplace——

Chairman ANDREWS. Mr. Gray, if we could just ask you to summarize.

Mr. GRAY. Absolutely. The act would call for employers to select one group over another within it. You do not have to go outside the workplace. So what our membership is asking is that you take a deliberate look at this and see whether or not, in fact, the current

system is broke before we go and amend this very historic Civil Rights Act.

[The statement of Mr. Gray follows:]

Prepared Testimony of Michael J. Gray,
Labor and Employment Partner at Jones Day,
on Behalf of the HR Policy Association

Good afternoon Chairman Andrews and distinguished members of the Subcommittee. Thank you for this opportunity to provide testimony on the Workplace Religious Freedom Act of 2007 (WRFA),[1] a proposed amendment to Title VII of the Civil Rights Act of 1964. I am testifying today on behalf of HR Policy Association, an organization comprised of the chief human resource officers of more than 250 of the largest corporations in the United States. These corporations collectively employ over 12 million workers in the United States and over 18 million worldwide. Among its primary missions, HR Policy Association seeks to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the modern workplace.

I am a partner at Jones Day, an international law firm of over 2,300 lawyers with 30 offices located around the world. I lead the labor and employment practice in Chicago, where for the last 16 years I have had the privilege of counseling and representing employers of all sizes with issues affecting the workplace. I frequently speak to companies and bar associations and write about labor and employment issues. In fact, in 2006, I co-authored an article on religion in the workplace for the American Bar Association's Human Rights Journal.[2] In this article, Professor Samuel Estreicher of NYU Law School and I outlined issues facing employers related to employee requests for religious accommodation. Employers continue to need that direction, but WRFA would not assist in providing clarity; rather, the law risks adding another layer of confusion to an already complicated set of rules.

The United States has been called one of the most devout nations in the world.[3] Considering this fact, and with an ever-growing number of religions, employers face a daily challenge to craft solutions to manage effectively and fairly their workforce.[4] Employers do not take this obligation lightly. What our members seek, and what their employees need, are standards that will empower them to maintain a workplace free of religious discrimination or harassment -- a neutral work zone that treats one employee no more favorably than another.

As you well know, the historic Title VII of the Civil Rights Act of 1964, as well as parallel state equal employment laws, task employers with maintaining a workplace free of discrimination, including discrimination and harassment based on an employee's religious

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[1] H.R. 1431, 110th Congress (2007). As you may know, versions of H.R. 1431 have been introduced in Congress a number of times over the last 14 years. H.R. 4237, 106th Cong. (2000) (House Version); S. 1668, 106th Cong. (1999) (Senate Counterpart); H.R. 2948, 105th Cong. (1997); S. 92, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117 104th Cong. (1996); S. 2071 104th Cong. (1996); H.R. 5233 103d Cong. (1994).

[2] Samuel Estreicher & Michael J. Gray, *Religion in the U.S. Workplace*, 33 HUM. RTS. 17, at 17 (Summer 2006).

[3] THE PEW GLOBAL ATTITUDES PROJECT, THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, AMONG WEALTHY NATIONS . . . U.S. STANDS ALONE IN ITS EMBRACE OF RELIGION (Dec. 19, 2002).

[4] BARRY A. KOSMIN, EGON MAYER & ARIELA KEYSAR, THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK AMERICAN RELIGIOUS IDENTIFICATION SURVEY (2001).

beliefs. Since 1972, Title VII required companies to provide reasonable accommodation to employees based upon religion.[5] The law, as it has been interpreted by courts and the Equal Employment Opportunity Commission (EEOC), attempts to balance the desire to accommodate an employee's religious practices against the need to avoid undue impact on other employees or the business as a whole.

We remain concerned that WRFA will significantly disrupt this balance. In many cases, WRFA will create unnecessary confusion for even the most well-meaning employer as to its obligations of religious accommodation. In some cases, the WRFA will elevate the rights of employees seeking to avoid a company policy or practice based upon his or her religion over other employees and their beliefs. Indeed, the law goes too far in demanding that companies provide accommodation, including financial support, for one employee while risking unfairly burdening other employees in the process. And, WRFA risks these unintended consequences despite the fact that protections under the existing law provide ample encouragement to accommodate employee's religious beliefs in the workplace. Ultimately, WRFA leaves employers, and their employees, with more questions than answers and we urge this Subcommittee to evaluate the proposed legislation carefully and focus on the practical impact this amendment to Title VII would have on America's businesses and workforce.

Current Law Provides for Religious Accommodations in the Workplace

Title VII institutionalized the protection of religious freedoms as part of a broader scheme to protect employees from discrimination on the basis of race, gender, national origin and religion. Among the prohibitions, the law forbade discrimination against an employee based on his or her religious beliefs. In 1972, Congress responded to questions as to whether this prohibition included an obligation to accommodate an employee's religious needs by amending Title VII.[6] The amendment provided a heightened form of protection, making religion the only enumerated category under Title VII in which employers must take affirmative measure -- "reasonable accommodation" – to protect employees.[7]

The law provides no single template for handling religious accommodation requests. Rather, employers may choose among reasonable accommodations to balance the request for accommodation with the needs of other employees or the business as a whole.[8] Title VII excuses the employer from any obligation to accommodate if the employer would incur an "undue hardship" as a result of the accommodation.[9] According to the U.S. Supreme Court, to balance these competing concerns, "undue hardship" equates to anything more than a *de minimis* cost.[10]

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[5] Section 701(j) of Title VII as codified by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amended at 42 U.S.C. §2000e).

[6] *Id.*

[7] Congress later used a similar framework in crafting the Americans with Disabilities Act of 1990.

[8] *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

[9] Civil Rights Act of 1964, 29 U.S.C. § 2000e (2000).

[10] *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977).

The Supreme Court carefully crafted this standard to address concerns that any standard that made accommodation too costly may amount to reverse religious discrimination.[11] Indeed, any attempt at increasing the support employers give a particular religious group over another raises Constitutional concerns under the Establishment Clause.[12] Mindful that the Supreme Court sought to insulate Title VII rather than eviscerate it, courts applying the *de minimis* standard routinely find that employers will not be excused from providing accommodations because of minor cost or inconvenience.[13]

Under this framework, an employer's duty to accommodate an employee's religious practice or belief currently encompasses a wide scope of religious practices, particularly because courts have broadly defined the scope of the term "religion" under the law. Title VII defines religion as "all aspects of religious observance and practice, as well as belief."[14] According to interpretive guidelines issued by the EEOC, the definition includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[15] For purposes of determining whether a belief is "religious," according to the EEOC, it may not be important that the professed belief is not shared by the religious group to which the individual belongs.[16]

Under this expansive interpretation, the EEOC and federal courts have held that Title VII protects a wide range of religious beliefs and practices from guaranteeing the right to wear religious headdress at work during Ramadan pursuant to the Muslim faith[17] and permitting a day-off to observe the Jewish holy day of Yom Kippur,[18] to less mainstream protections for refusing to contribute to union dues because it violated tenets of the Seventh Day Adventists' convictions[19] and white supremacy preached by the sect of Creativity.[20] Courts though remain

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[11] *See id.*

[12] *See, e.g., H.R. 1445, The Workplace Religious Freedom Act of 2005: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 109th Cong. 34–38 (2005) (statement of Samuel A. Marcosson, Associate Dean and Professor of Law, Louis D. Brandeis School of Law, University of Louisville).

[13] *See, e.g., Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (holding that "a claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of actual imposition on co-workers or disruption of the work routine"); 29 C.F.R. § 1605.2 (2008) (stating that "a mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship").

[14] Civil Rights Act of 1964, 29 U.S.C. § 2000e (2000).

[15] 29 C.F.R. § 1605.1.

[16] *Id.*

[17] *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (finding employer liable for refusing to permit a Muslim employee to wear a headscarf during the holy month of Ramadan).

[18] *See, e.g., EEOC v. Ilona of Hung., Inc.*, 108 F.3d 1569 (7th Cir. 1997) (finding religious discrimination against a hair salon for failing to grant unpaid time off to two employees for Yom Kippur).

[19] *Tooley*, 648 F.2d at 1243.

[20] *Peterson v. Wilmur Commc'ns*, 205 F. Supp. 2d 1014, 1019–21 (E.D. Wis. 2002).

reluctant to inquire into whether a certain belief or practice is, in fact, "religious."[21] Most courts limit their analysis to whether the belief is "sincerely held" by the employee.[22] And other courts avoid even that admittedly "thorny issue" when circumstances permit.[23] In the workplace, however, employers may not simply dodge the issue. Instead, they must evaluate the particular facts and circumstances and decide whether to accommodate requests, which may be controversial. Accordingly, it is imperative that employers be permitted flexibility to carry out this important mission and not be burdened with impractical blanket restrictions like those mandated under WRFA.

The flexibility permitted under Title VII's current framework enables employers and employees to work together to find an appropriate accommodation that best suits the needs of both the individual and workplace. In fact, a review of recent cases and a 2001 survey conducted by the Tanenbaum Center indicates that this needed dialogue is in fact occurring. A majority of employers, for example, maintain personal days that employees may use for religious observance.[24] Most requests entail minor changes in routine such as requests for schedule changes and office holiday decorations, and employers routinely communicate with the requesting employees and other employees to reach compromises.[25] For requests that cause a greater disturbance, employers analyze the potential negative impact of the accommodation on other employees, on customers and on the workplace as a whole.[26] Some employers have established permanent committees to help guide them through this process, so-called affinity groups, which consist of employees sharing common religious beliefs.[27]

Where employers and employees cannot reach an agreement, the law already provides a competent mechanism to resolve disputes. Employees have ample access to the EEOC and the courts for redress. Approximately 2,500 religion-based charges were filed during each of the

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[21] The courts try to not to evaluate a religious organization as a whole, but rather the particular individual's beliefs. In doing so, a court may find that the individual's specific "religious" organization was political rather than religious and therefore not afforded protections. *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973) (finding that Klu Klux Klan is not a religion under Title VII, but a political organization). *But see Peterson*, 205 F. Supp. 2d at 1021 (holding that employee's racist views as a member of a white supremacist church qualified as religious beliefs despite fact that his church organization was very similar to the Klu Klux Klan).

[22] *See, e.g., U.S. v. Seeger*, 380 U.S. 163 (1965).

[23] *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (court intentionally avoids deciding the "thorny issue" of whether insistence on facial jewelry is result of sincerely-held religious belief, "one to which the courts are ill-suited," but decides that facts do not support finding of religious discrimination.).

[24] Eighty percent of respondents to the Tanenbaum survey, for example, reported that their company provides personal days that can be used for religious holidays. TANENBAUM CENTER FOR INTERRELIGIOUS UNDERSTANDING, RELIGIOUS BIAS IN THE WORKPLACE (2001).

[25] *See id.*

[26] *H.R. 1445, The Workplace Religious Freedom Act of 2005: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 109th Cong. 38–44 (2005), (statement of Camille A. Olson on behalf of the U.S. Chamber of Commerce).

[27] Samuel Estreicher & Michael J. Gray, *Religion in the U.S. Workplace*, 33 HUM. RTS. 17, 20 (Summer 2006).

fiscal years between 2003 and 2006.[28] The percentage of religious discrimination charges filed at the EEOC, of which only a portion involve accommodation issues, has remained relatively static at approximately 3% of all cases filed at the EEOC.[29]

The body of recent Title VII case law indicates that courts, when faced with religious accommodation questions, weigh the rights of the individual against those of fellow employees and third parties. In some cases, there are the relatively clear-cut requests involving an individual's religious practice that has little, if any, impact on others. Challenges to professional appearance policies unrelated to safety and health issues, for example, almost invariably fall in favor of the individual seeking an accommodation.[30] Courts also often find that scheduling requests for religious holidays are "reasonable" and must be accommodated.[31]

In other cases, when faced with more difficult scenarios that require consideration of more significant impact on fellow employees or the overall business, courts demonstrate appropriate reluctance to create disturbances in the workplace and analyze the competing factors in reaching a decision. Recently, for example, courts have been confronted with situations in which one employee's desire to proselytize bordered on harassment of another, such as in the case where a supervisor repeatedly lectured a subordinate about the sinful nature of her sexual orientation[32] and a demand to wear facial jewelry in light of an employee's membership in the Church of Body Modification.[33] They also reviewed instances in which an employee's actions directly affected third parties and undermined an employer's goal of maintaining a neutral workplace, such as when an employee insisted on making religious comments to patients[34] and another who signed customer correspondence with "Have a Blessed Day."[35] In all of these cases, the courts used the flexibility of the current standard to evaluate the employee's right to perform religious acts within the overall objective of maintaining a discrimination-free workplace.

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[28] EEOC, Religion-Based Charges FY 1997 – FY 2006 (Jan. 31, 2007), http://www.eeoc.gov/stats/religion.html. The EEOC dismissed a majority of the charges on the basis that they lacked "reasonable cause," meaning it had no reasonable cause to believe that discrimination occurred based upon evidence obtained during its investigation. EEOC, Charge Statistics FY 1997 Through FY 2006 (Feb. 26, 2007), http://www.eeoc.gov/stats/charges.html.

[29] *Id.*

[30] *See, e.g. EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (finding employer liable for refusing to permit a Muslim employee to wear a headscarf during the holy month of Ramadan); *Potter v. District of Columbia*, 382 F. Supp. 2d 35 (D.D.C. 2005) (Muslim firefighters successfully challenged a department policy that required them to shave their beards).

[31] *See, e.g., EEOC v. Ilona of Hung., Inc.*, 108 F.3d 1569 (7th Cir. 1997); James F. Morgan, *In Defense of the Workplace Religious Freedom Act: Protecting the Unprotected Without Sanctifying the Workplace*, 56 LAB. L. J. 68, 70 (Spring 2005).

[32] *Bodett v. CoxCom Inc.*, 366 F.3d 736 (9th Cir. 2004).

[33] *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005).

[34] *Morales v. McKesson Health Solutions, LLC*, 2005 U.S. App. LEXIS 4629 (10th Cir. Mar. 22, 2005), *cert denied* 2005 U.S. LEXIS 7490 (Oct. 11, 2005).

[35] *Anderson v. U.S.F. Logistics Inc.*, 274 F.3d 470 (7th Cir. 2001).

Nobody would assert that the current system is perfect. Indeed, as the First Circuit Court of Appeals noted in *Cloutier,* courts remain ill-suited for the difficult question of what is a religion.[36] Still, a review of the workplace and the cases interpreting it demonstrate that religious beliefs are being accommodated. Clarity seems to be coming, albeit slowly. If enacted, however, WRFA will unnecessarily overhaul the system with new definitions, untested standards, impractical rules and added layers of complexity.[37] For these reasons, HR Policy Association opposes the proposed legislation.

WRFA's Framework Does Not Work

WRFA incorporates terms and standards from an entirely different type of employment law, the American with Disabilities Act (ADA), which do not work in the context of religious accommodations.

First, accommodation under the ADA is designed to *enable* an employee to work, whereas religious accommodations *excuse* employees from performing their job duties.[38]

Second, the standards created to analyze accommodations for individuals with disabilities simply do not translate well to the analysis of accommodations for employees' religious expressions. It should come as no surprise that WRFA, as a proposed hybrid of Title VII and the ADA, will add to the confusion for employers and employees rather than clarity.

Third, WRFA fuels the confusion by borrowing terms of art from the ADA,[39] but then ascribing different meanings to those same words.[40] WRFA's adoption of the ADA's economic

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[36] *Cloutier*, 390 F.3d at 132.

[37] Proponents of WRFA argue it is akin to the 1997 "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace," which the federal government issued to "clarify and reinforce the right of religious expression in the federal workplace." Rather than dramatically changing current law like WRFA proposes, however, the 1997 guidelines set forth standards to ensure that federal law did not unduly restrict appropriate forms of religious expression in the workplace. HR Policy Association, *Analysis of S. 677 / H.R. 1445, The Workplace Religious Freedom Act, by Sen. Rick Santorum (R-PA) and Rep. Mark Souder (R-IN)* (Mar. 30, 2005), at 7–8.

[38] *Id.* at 12.

[39] Definitions under the ADA continue to be debated frequently. In 2006, the U.S. Equal Employment Opportunity Commission received over six times more charge receipts based on the ADA than on charge receipts based on religious discrimination (including religious accommodation and religious discrimination cases). EEOC, Charge Statistics FY 1997 Through FY 2006 (Feb. 26, 2007), http://www.eeoc.gov/stats/charges.html. Of those charge receipts, 520 ADA-based charge receipts were considered for litigation, EEOC, Americans With Disabilities Act of 1990 (ADA) Charges FY 1997 - FY 2006 (Feb. 26, 2007), http://www.eeoc.gov/stats/ada-charges.html, while only 99 religious discrimination charge receipts were considered. EEOC, Religion-Based Charges FY 1997 – FY 2006 (Jan. 31, 2007), http://www.eeoc.gov/stats/religion.html.

[40] For example, although both WRFA and the ADA define "undue hardship" as an accommodation requiring significant difficulty or expense, the factors that are to be considered under WRFA are much narrower. Under the ADA, the analysis of whether an "undue hardship" exists includes examining the accommodation's effect on a particular facility, the type of operations run by the business and the composition of the workforce. WRFA's version generally aggregates the employer's resources and does not even consider the business operations or workforce. 42 U.S.C. § 12111(10)(B) (2000); H.R. 1431, 110th Cong. § 2 (2007).

standard of "undue hardship" is a prime example.[41] WRFA's definition of "undue hardship" only permits an employer to deny an accommodation request if it can show it would incur "identifiable increased costs."[42] This standard provides an employer little guidance. Whereas accommodations under the ADA generally involve architectural alterations or equipment purchases with identifiable costs, accommodations for religious practices have consequences that often cannot be so easily quantified.[43] Permitting one employee, for example, to spray a swastika on a mirror as a religious "good luck" symbol certainly would offend fellow employees, inevitably leading to conflict, loss of morale and a general degeneration of the workplace, but at what quantifiable cost?[44] Similarly, acquiescing to a nurse's desire to counsel gay patients that their lifestyle was damned and their only salvation was through Christianity significantly affects third parties, but it hardly can be analogized to assisting an employee with a physical disability.[45] WRFA's "undue hardship" standard does not contemplate this inability to weigh such pertinent factors and employers will face inevitable confusion in trying to apply the standard.

WRFA's addition of the concept of "essential functions" to religious accommodations further complicates the analysis an employer will be required to perform. Under the ADA, the term guides employers who seek to limit employment to those that can perform fundamental tasks (as opposed to marginal ones), which in the context of disability law may be more readily identifiable.[46] WRFA presumes that practices relating to clothing, taking time off, "or other practices that may have a temporary or tangential impact on the ability to perform job functions" cannot be "essential."[47] Even though an employer may be obligated to modify a job requirement for religion there is no clarity for employers seeking to comply with WRFA on how to do so. This is particularly necessary given the highly subjective nature of religion beliefs and practices.[48]

WRFA's Negative Impact on the Workplace Too Great

In many cases, WRFA will have little, if any, positive impact because courts already use Title VII to enforce an employer's duty to reasonably accommodate an employee's religious practices. Just a few weeks ago, for example, the Eighth Circuit held that the United Parcel

[41] Under the ADA, an employer's obligation to accommodate is measured by the cost of the accommodation, its effect on the relevant facility, the type of operations, and workforce composition. 42 U.S.C. § 12111(10)(B) (2000).

[42] H.R. 1431, 110th Cong. § 2 (2007).

[43] For example, a TTY system that will enable an employee with a hearing disability costs $300-$600.

[44] *Kaushal v. Hyatt Regency Woodfield*, 1999 U.S. Dist. LEXIS 9563 (N.D. Ill. June 21, 1999) (case dismissed because employee failed to provide notice of accommodation but court also reasoned that even if notice was provided employer would not have been obligated to accommodate under Title VII).

[45] *Knight v. Connecticut Dep't. of Publ. Health*, 275 F.3d 156 (2nd Cir. 2001).

[46] *See* S. Rep. No. 116, 101st Cong., 1st Sess. 26 (1989); HR Policy Association, *Analysis of S. 677 / H.R. 1445, The Workplace Religious Freedom Act, by Sen. Rick Santorum (R-PA) and Rep. Mark Souder (R-IN)* (Mar. 30, 2005), at 14.

[47] H.R. 1431, 110th Cong. § 2 (2007).

[48] See *supra* p. 3 for a discussion of the expansive interpretations of religion.

Service violated Title VII's religious protections by firing one of its drivers.[49] The driver refused to complete his route on a Friday during peak season after notifying UPS that working past sundown would violate his beliefs as a member of the Seventh Day Adventist Church.[50] Finding that UPS could have reasonably accommodated the plaintiff by splitting his delivery route amongst other drivers, the court upheld the jury finding that the resulting costs and inconveniences did not amount to an "undue hardship."[51]

This case, however, is just one recent example of the cases in which Title VII already reaches the result WRFA's proponents seek. For example,

- An employer could not enforce a "no-beard" workplace policy based on "professional appearance," as opposed to safety and health issues, because it would violate the employer's obligation to reasonably accommodate an employee's religiously motivated desire to maintain a beard.[52]
- An employer's obligation to reasonably accommodate included employee requests to not be scheduled on any Easter Sunday shift.[53]
- An employer's accommodation obligation included Jewish employees' requests for leave on Yom Kippur.[54]
- An employer's obligation to reasonably accommodate its employees included individualized employee requests for days off to attend religious services relating to family members.[55]
- A supervisor's spontaneous prayers and bible references did not create an undue hardship for the employer because it did not create an environment of religious favoritism. Although a fact-specific finding, the court generally held that employees may engage in religious conduct that does not interfere with their official job duties.[56]

Other unintended applications of WRFA, however, outweigh its usefulness. A case from the Ninth Circuit Court of Appeals decided several years ago serves as an example of which application of the Act may lead to a different outcome: one that places employees in conflict, compromises workplace safety and inhibits its efficiency. In that case, the plaintiff objected to a poster depicting a homosexual displayed as part of the employer's diversity campaign on the basis that if offended his religious beliefs.[57] He requested that his employer either permit him to post biblical verse decrying homosexuality or remove the poster, and brought suit under Title VII

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[49] *Todd Sturgill v. United Parcel Serv., Inc.*, No. 06-4042, 2008 U.S. App. LEXIS 806, at *8 (8th Cir. Jan. 15, 2008).

[50] *Id.* at *5-6.

[51] *Id.* at *8.

[52] *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673 (E.D. Ark. 1993).

[53] *Pedersen v. Casey's Gen. Stores, Inc.*, 978 F. Supp. 926 (D. Neb. 1997).

[54] *EEOC v. Ilona of Hung., Inc.*, 108 F.3d 1569 (7th Cir. 1997).

[55] *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993).

[56] *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996).

[57] *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 601 (9th Cir. 2004).

when the employer refused.[58] The court found that either accommodation would place undue hardship on the employer.[59] It would have forced the employer to permit the posting of messages intended to demean other employees, effectively elevating the rights of the plaintiff over other employees. It also would have forced the employer to exclude sexual orientation from its diversity program, thereby compromising its effort to create a harassment-free, neutral work zone.[60] These costs to the employer were certainly not quantifiable and the request was unrelated to the "essential functions" of the plaintiff's job. Under WRFA, therefore, the employer may have been required to grant the employee's proposed accommodation leading to a different result.

Indeed, examples of other conflicts in the workplace that may have been decided differently under WRFA exist:

- An employer properly required an employee to cover a religious symbol where the employee was a member of the Church of the American Knights of the Ku Klux Klan and stated that his forearm tattoo of a hooded figure standing in front of a burning cross was a sacred symbol of the Church.[61]
- An employer properly discharged a telephone triage nurse who refused to stop making religious comments to patients calling a hotline.[62]
- A supervisor who continually lectured a homosexual subordinate about her sexual orientation describing it as a sin was properly terminated for violating the company's reasonable policy against harassment, including harassment based on sexual orientation.[63]
- A social worker who tried to drive out the demons in a client having a seizure instead of calling for medical help was properly fired for violating agency rules.[64]

If enacted, WRFA's more rigid accommodation standards would leave many employers without flexibility to protect appropriate religious expression of the requesting party as well as the religious beliefs of other employees. The Act arguably may create an environment ripe for reverse religious discrimination which, even if constitutional, is hardly a desired result for any interested parties.

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[58] *Id.*

[59] *Id.* at 607.

[60] It may have also exposed the employer to harassment liability. Under Title VII, an employer is liable for harassing conduct of its employees that it should have known about but failed to take corrective action. *See* 42 U.S.C. §§ 2000e-2(a)(1) (1988); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

[61] *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000).

[62] *Morales v. McKesson Health Solutions, LLC*, 2005 U.S. App. LEXIS 4629 (10th Cir. Mar. 22, 2005), *cert. denied*, 2005 U.S. LEXIS 7490 (Oct. 11, 2005).

[63] *Bodett v. CoxCom Inc.*, 366 F.3d 736 (9th Cir. 2004).

[64] *Howard v. Family Independence Agency*, 2004 Mich. App. LEXIS 410 (Mich. Ct. App. 2004) (unpublished).

Conclusion

Title VII currently requires the accommodation of an employee's genuinely held religious beliefs. At best, WRFA would further complicate the accommodation dialogue between employer and employee. At worst, WRFA may create an emotionally-charged work atmosphere where religious expression in the workplace would be exalted over the rights of other protected classes.

As you are well aware, the concepts of religious freedom and tolerance are cornerstones of American culture. Title VII was designed to uphold these fundamental tenets and remains crucial to maintaining the balance needed in such a tolerant society. The Supreme Court has said, "the First Amendment embraces two concepts – *freedom to believe and freedom to act*. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[65] The title of this Act, Workplace Religious Freedom Act, purports to protect religious freedoms. However, the more than 250 of the U.S.'s largest employers who comprise HR Policy Association believe that this law would not only hurt American businesses of all sizes, but fail to better protect religious freedoms. Accordingly, the HR Policy Association asks this Subcommittee to consider the proposed legislation within the greater context of providing all employees with a productive, non-hostile work environment.

[65] *Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1940).

Chairman ANDREWS. Thank you very much.

Ms. Al-Suwaij, welcome to the committee.

STATEMENT OF ZAINAB AL–SUWAIJ, EXECUTIVE DIRECTOR, AMERICAN ISLAMIC CONGRESS

Ms. AL-SUWAIJ. Thank you very much.

Mr. Chairman and members of the subcommittee, thank you very much for inviting me to testify to you today on the very important topic. As someone who is an American citizen by choice, not by birth, it is a special honor to be invited to speak before you today.

I was drawn to become an American citizen because of our country's sincere and unique commitment to religious freedom and indi-

vidual rights. I am here today to share with you my perspective on respecting these rights in workplaces across the country.

I appear before you as a Muslim-American who experienced discrimination in workplace, as well as in my capacity as an executive director of the American Islamic Congress, a civil rights organization promoting tolerance and exchange of ideas among Muslims and between other people.

As a native of Iraq, I grow up not experiencing individual liberties. Instead, my childhood was spent under a repressive dictatorship, and the environment that I grow up with in the classrooms that simply a student can disappear because they are discussing political subjects in school. Add to that the hate messages that the teachers always mentioned in the classrooms.

I grow up wearing my head scarf, or we call it in Arabic a hijab. It may seem hard to believe, but in the 1980s, Basra in Iraq was largely secular city, and I was only student in my whole school that is wearing the head scarf, because of my family tradition as well as it was something that I decided to do when I was young. I was always criticized by my teachers because of that, but I stayed true to my beliefs.

In 1991, I joined the uprising against Saddam Hussein's government as well as I was one of the first women who would be there in the industry to overthrow Saddam and his government. Unfortunately, this uprising failed while we are waiting for the American help and it did not come.

I experienced a real freedom when I moved to the United States in 1992. For the first time, I could be who I am and I could say what I want and comfortable in my own identity and just like a dream come true.

Of course, life is never so simple. I remember going for a job interview many years ago. The woman who was interviewing me simply was not comfortable with me wearing a head scarf, and at the beginning, she asked me if I wear my head scarf only at night or I wear it during the day. I told her, "Well, I wear it when I am in public." At that point, the interview ended.

Later on, I worked at Interfaith Refugee Ministry as a refugee resettlement officer, and that was part of the Episcopal Social Service. Many of my clients fled their countries because of persecution, whether through religious persecution or politics, and one of my clients applying for a job, and the same thing happened to her. Basically, the employer asked her to put her head scarf in a way that is very comfortable for his customers when they come and see her.

At the same time, I was representing another client of mine, and he asked his employer for a break for 5 minutes to have a midday prayer, and his employer denied that right for him. At the same time, it was OK for people to go and smoke cigarettes every hour outside the building. So I did my best to help these people, but, unfortunately, I was not successful.

After the terrible attack of 9/11, I decided to take an action. The terror I thought that I had left behind is following me here to my country that I love and my family.

With a group of concerned Muslims, I co-founded the American Islamic Congress. We promote nonreligious civic initiatives, which challenge increasingly the negative persecution of Muslims by ad-

vocating responsible leadership and two-way interfaith understanding.

As a Muslim-American, I feel and I strongly understand there is the freedom that I enjoy in this country, and I would like many other people around the world to enjoy the same rights. To be specific, Muslim-American women who choose to wear hijab have the right to work with their head scarf on and should not fear persecution from their employers.

Muslim-American workers who choose to pray five times a day have the right to conduct prayers during work hours. Muslim-Americans who choose have the right to abstain from handling alcohol or pork at work. And all of these personal freedoms do not need to disturb American workplaces and should be able to be integrated into a decent way that respects workers of all backgrounds.

As someone who grow up under hard repression and religious intolerance, I recognize how precious American freedoms are. As someone who had witnessed some examples of anti-Muslim sentiments in American workplaces, I want to ensure that both employees and employers work together to an environment of mutual respect, as well as we are proud to speak out on behalf of protecting religious diversity in the workplace, and we believe H.R. 1431 will protect individual rights and enhance interfaith understanding.

Thank you very much.

[The statement of Ms. Al-Suwaij follows:]

Prepared Statement of Zainab al-Suwaij, Executive Director, American Islamic Congress

Mr. Chairman and Members of the Committee: Thank you for inviting me to testify to you today on this important topic. As someone who is an American citizen by choice—not by birth—it is a special honor to be invited to speak before you today. I was drawn to become an American citizen because of our country's sincere and unique commitment to religious freedom and individual rights. I am here today to share with you my perspective on respecting these rights in workplaces across the country.

I appear before you as a Muslim-American who has experienced discrimination in the workplace, as well as in my capacity as executive director of the American Islamic Congress, a civil rights organization promoting tolerance and the exchange of ideas among Muslims and between other peoples.

As a native of Basra, Iraq, I did not grow up experiencing individual liberty. Instead, my childhood was spent under a repressive dictatorship, in an environment where classmates could disappear simply for discussing politics in school. Rather than encourage respect for diversity and religious difference, teachers often taught hatred. I recall one elementary school teacher telling our class that Hitler was a great man because he burned Jews alive.

Even as a child, I stood out. I challenged teachers who praised Hitler, I refused to join the Ba'ath party—and I wore hijab. It may seem hard to believe, but in the early 1980s, Basra was a largely secular city and I was the only student in my third-grade class to wear the hijab. I come from an established family of Iraqi clerics; wearing hijab is part of my family tradition. For that decision, I was criticized by my teachers in the classroom—but I stayed true to my beliefs.

In 1991, I participated in the failed uprising against Saddam Hussein, which initially succeeded in liberating most Iraqi provinces but was then crushed when the US broke its promise to help. I fled Iraq with nothing, met my husband, and moved to the US. For the first time in my life, I experienced real freedom. I could say what I wanted, be who I wanted, and be comfortable in my own identity. It was a dream come true.

Of course, life is never so simple. I remember going for a job interview some years ago. The woman interviewing me was clearly uncomfortable because of my hijab. At one point, she asked me: "Do you wear that thing on your head at night only, or also during the day?" The implication was clear: Wearing hijab on the job was a

no-no. I calmly explained to her that I wear the hijab whenever I am in public, but I realized that the interview was effectively over.

Later, I worked at Interfaith Refugee Ministry, the refugee resettlement arm of Episcopal Social Service. Many of my clients were individuals fleeing repression in the Muslim world who had come to the US seeking a better life. Some of my clients experienced discrimination in the workplace because of their religious practices. One woman was asked to change the way she covered her hair at work so it would be less "troublesome" to customers. One man requested five minutes at noon for midday prayer, but was denied by his employer. I did my best to assist them, but typically found there was little I could do.

After the terrible terror attacks of September 11, 2001, I decided to take action. The terror I thought I had left behind had suddenly followed me here, targeting the country I loved and me and my family. With a group of concerned Muslim-Americans, I co-founded the American Islamic Congress.

We are a non-religious civic initiative challenging increasingly negative perceptions of Muslims by advocating responsible leadership and 'two-way' interfaith understanding. As Muslim-Americans, thriving amidst America's multicultural society and civil liberties, we promote these same values for the global Muslim community. We are not afraid to advocate unequivocally for women's equality, free expression, and nonviolence—making no apologies for terrorism, which primarily claims Muslim lives.

We are "passionate about moderation" and led by a group of young activists in their 20s and 30s. We are advancing a new responsible Muslim civic leadership. In fact, every month we host a Capitol Hill Distinguished Speakers Series on Muslim affairs, co-sponsored here on the Hill by the Religious Freedom and Anti-Terrorism caucuses.

As the executive director of the American Islamic Congress, I appeal to you today to take action to protect religious liberty and individual rights in the workplace. We Muslim-Americans, passionate about moderation, share the values this country has been built on. Many of us have come to the United States fleeing religious persecution and political repression. Muslim-Americans deserve the same equal treatment as all other Americans, and we do not want to see our religion used to discriminate against us.

To be specific, Muslim-American women who choose to wear hijab have the right to work with their headscarf on and should not fear repercussions from employers. Muslim-American workers who choose to pray five times a day have the right to conduct prayers during work hours. Muslim-Americans who choose to have the right to abstain from handling alcohol or pork. All of these personal freedoms do not need to disrupt American workplaces and should be able to be integrated in a decent way that respects workers of all backgrounds.

Respecting workplace diversity, I should add, extends to Muslim employers as well. As part of our "two-way" understanding, we in the Muslim community need to take practical steps to address discrimination from within our own community. Muslim employers should similarly not discriminate on the basis of gender, race, or religion.

Indeed, there is an enormous religious diversity within the Muslim community, which must be recognized. We Muslim-Americans are a remarkable diverse community: Sunnis of diverse religious traditions, Shi'a of diverse religious traditions, numerous minority sects, and of course people of Muslim heritage who are not religious. There is not one way to practice Islam, and the diversity within our community needs to be respected.

The American Islamic Congress is proud to celebrate the diversity of the Muslim community and its contribution to the diversity of American society. We are proud to speak out on behalf of protecting religious diversity in the workplace, and we believe resolution 1431 will protect individual rights and enhance interfaith understanding.

As someone who grew up under hard repression and religious intolerance, I recognize how precious American freedoms are. As someone who has witnessed some examples of anti-Muslim sentiments in American workplaces, I want to ensure that both employees and employers work together in an environment of mutual respect. By coming together to promote religious diversity here in the US, we will offer a shining example to countries and societies around the world of how people of diverse religious outlooks can work together to advance a tolerant and free society.

Chairman ANDREWS. Ms. Al-Suwaij, thank you for your very eloquent and moving testimony. Thank you very, very much.

Ms. Goldstein, we are very happy to have you with us.

STATEMENT OF JUDY GOLDSTEIN, SPEECH THERAPIST

Ms. GOLDSTEIN. Thank you. And good afternoon, Mr. Chairman and distinguished members of the subcommittee.

I thank you for inviting me here today and allowing me the opportunity to share with you my recent experience as a Sabbath-observant Jew in the workforce.

My name is Judy Goldstein, and I am a New Jersey resident. I have recently graduated with a master's in speech and language pathology. Providing speech and language services to the pediatric population is my passion, as I believe it offers a child the central keys to achieving success in life.

On January 8, 2008, I was interviewed by a supervisor of a public school located approximately a 45-minute drive from my home. The position for which I interviewed entailed providing speech and language services for children in kindergarten through fifth grade. It was a nonunion position.

On January 13, 2008, I received a job offer orally from the H.R. Department. At that time, I was informed that the job was from Monday through Friday, 8:55 a.m. to 3:35 p.m.

As a person who strives to always act honorably, when I accepted the position, I explained that I am a Sabbath observer and that, in order for me to properly observe the Sabbath, I would be required to leave work 1 hour early on certain Fridays, essentially during the winter months when the sun sets early. This would allow me adequate time to ride home before the onset of the Sabbath.

The gist of her response was, "I am sorry. We would have loved to have you on board. However, we cannot accommodate your needs. There are a lot of individuals employed, and they each have their own specific religious requirements. If we accommodate your needs, we need to accommodate theirs."

It was never my intention to shirk my responsibilities to the school or to the students. I was willing to work out a mutually acceptable arrangement with the school so that both of our requirements could be met. For example, I offered to come in 40 minutes early on Friday, the time allotted for preparation, and prepare then. Additionally, I offered to skip the 20-minute lunch break I was entitled to.

Again, to these suggestions, the response was negative. These alternatives would not work as I would be required to be there for the contractual school hours from 8:55 a.m. to 3:35 p.m. period.

I then contacted a supervisor who initially interviewed me and explained my predicament. She said that it was most likely a problem to accommodate my needs, but that she would consult H.R.

She did add that she might be able to offer me a high school caseload instead of the initial offer at the elementary school. This would avoid the problem as the high school ends at 2:20 p.m. However, this was not the job I was interviewed for, nor the one I was offered and accepted.

I reiterated my desire to work with the caseload for which I had interviewed. We concluded that she would get back to me after speaking with Human Resources.

A couple of days later, I emailed the supervisor to ask her where the job offer stood. She replied that the district was unable to accommodate my request and, therefore, assumed I was not taking the position. But, in reality, I had never rejected the position. I accepted the position. But when the district decided that it would not accommodate my religious needs, it effectively rescinded the offer.

I contacted an Orthodox Jewish organization that deals with these kinds of issues, and they in turn referred me to a lawyer. He explained to me that religious accommodations is not something that is provided at the whim of an employer, but that is a requirement provided for in federal and state law. The attorney advised me to send copies of these laws to the school along with a letter reiterating my willingness to make up the accommodated time.

The H.R. Department responded that they were providing an accommodation by offering an alternative position at the junior high, but, as I have already stated, this was neither the job I sought or was interviewed for. It was an entirely new position.

My interest was to find employment, not to pursue this further in court. It was not to embarrass anyone or get anyone in trouble. It was not to force anyone to hire me and work in a strained environment. To be honest, I was also worried about what effect it would have on my future prospects as employers surely do not want to hire employees that cause trouble. Indeed, it is not without concern for my future prospects that I appear here before you today.

Mr. Chairman and distinguished members of the subcommittee, I am neither a legislator nor a lawyer, and I cannot speak in any informed way about the law, but I can say this: I was interviewed for a job in my chosen field. I was deemed fully competent and was offered a position on merit and ability. I accepted. I disclosed my need for Sabbath accommodation. The offer was immediately rescinded.

I suggested a number of ways I could have fulfilled my professional responsibilities. No one claimed that these alternatives would not work. It was not the type of position, unlike that of a teacher in charge of a classroom of students, for example, that required me to be there until the bell rang.

I was told that I was being offered an accommodation, though it was a different position.

So bottom line is that I was not hired in the end because of my religious observance.

Again, thank you for allowing me to testify today about my experience. It was a disheartening and disillusioning one for me. But if my testimony will help others be spared the same experience, then I feel that I have made a modest contribution.

Thank you for listening.

[The statement of Ms. Goldstein follows:]

Prepared Statement of Judy Goldstein, Speech Therapist

Thank you and good afternoon, Mr. Chairman and distinguished members of the Subcommittee.

I thank you for inviting me here today and allowing me the opportunity to share with you my recent experience as a Sabbath-observant Jew in the workplace. My name is Judy Goldstein, and I reside in New Jersey. I have recently graduated from Nova Southeastern University, with a master's degree in Speech and Language Pa-

thology. Providing speech and language services to the pediatric population is my passion, as I believe it offers a child the essential keys to achieving success in life.

On January 8, 2008, I was interviewed by a supervisor of a public school located approximately a 45 minute drive from my home. The position for which I interviewed entailed providing speech and language services for children in kindergarten through 5th grade. It was a non-union position. On January 13, 2008, I received a job offer, orally, from the Human Resource Representative. At that time, I was informed that the position was from Monday through Friday, 8:55 AM to 3:35 PM. As a person who strives to always act honorably and ethically, when I accepted the position, I explained that I am a Sabbath observer and that, in order for me to properly observe the Sabbath, I would be required to leave work one hour early on certain Fridays of the year—essentially during winter weeks—when the sun sets early. This would allow me adequate time to arrive home before the onset of the Sabbath.

The gist of the representative's response was, "I am sorry, we would have loved to have you on board. However, we cannot accommodate your needs. There are many other individuals employed who have their own specific religious requirements and if we accommodate your needs, we will have to accommodate everyone's needs".

It was never my intention to shirk my responsibilities to the school or to the students. I understood that it might be necessary—and I was quite willing—to work out a mutually acceptable arrangement with the school so that both of our requirements could be met. For example, I offered to come in 40 minutes earlier on Friday, the time allotted for preparation time, and prepare then. I explained that preparation time does not involve participation of the students, and therefore is not dependent on their presence. I was also willing, and offered, to skip the 20 minute lunch break I was entitled to. Again, to these suggestions, the response was negative—the school was sorry, but these alternatives would not work, as I was required to be there for the contractual school hours, which are 8:55-3:35. Period. I was willing to pursue the matter further and pursue other arrangements but it was clear to me that the discussion was over.

I then contacted my prospective supervisor who initially interviewed me, and explained my predicament. She said that the need for accommodation was most likely a problem, but that she would consult HR. She did add that there was a possibility she might be able to offer me a high school caseload, instead of the initial offer at the elementary school. This would avoid the problem, as the high school ends at 2:20 PM. However, in all honesty, this possible offer was deeply disappointing and disconcerting to me. This was not the job I interviewed for, nor the one I was offered. It was not in the area of my specialty, nor the one of my choice. Indeed, I reiterated that my strength and interest is to work with younger children, and I again expressed my desire to work with the caseload for which I had interviewed. At the end of our discussion we concluded that she would get back to me after speaking to human resources.

A couple of days later, I emailed the supervisor to ask where the job offer stood. She replied that the district was unable to accommodate my request to leave work 1 hour early a week for approximately 3 months in the winter, and therefore assumed that I was not taking the position. But I had never really rejected the position. In fact, I accepted it, but when the district decided that it would not accommodate my religious needs, it effectively reneged on the offer.

I contacted an Orthodox Jewish organization that deals with these kinds of issues, and they in turn referred me to an experienced discrimination attorney. He explained to me that religious accommodation is not something that is provided at the whim of an employer or out of the goodness of his or her heart, but that it is a requirement provided for in Federal and State law.

The attorney advised me to send copies of these laws to the school officials, along with a letter, reiterating my willingness to work on any other non-religious work days or early morning non-scheduled working hours to make up the accommodated time. The HR department responded that they were providing an accommodation by offering an alternative position at the Junior high school. But, as I have already stated, this was neither my specialty nor my interest. It was not the job I sought and was interviewed for. It was not the position I was offered and accepted. It was not the position that was represented to me—it was something else entirely.

My interest was to find employment not to pursue this further in court. It was not to embarrass anyone or get anyone in trouble. It was not to force anyone to hire me and work in a strained environment. To be honest, I was also worried about what effect it would have on my future prospects—as employers surely do not want to hire employees that "cause trouble." Indeed, it is not without concern for my future prospects that I appear here, before you, today.

Mr. Chairman and distinguished members of the Subcommittee, I am neither a legislator nor a lawyer—and I cannot speak in an informed way about the law. But

I can say this—I was interviewed for a job in my chosen field. I was deemed fully competent and was offered a position on merit and ability. I accepted. I disclosed my need for Sabbath accommodation. The offer was immediately rescinded. I suggested a number of ways I could fulfill my professional responsibilities. No one claimed that these alternatives wouldn't work. It was not the type of position—unlike that of a teacher in charge of a classroom of students, for example—that required me to be in school until the bell rings. I was told that I was being offered an accommodation, though it was a different position. The bottom line is that I was not hired in the end because of my religious observances—If we have to accommodate your religious needs, we'll have to accommodate others.

Again, thank you for allowing me to testify today about my experience. It was a disheartening and disillusioning one for me. But if my testimony will help others be spared this same experience, then I feel that I have a modest contribution.

Thank you for listening.

Chairman ANDREWS. Well, Ms. Goldstein, your very provocative and insightful testimony, we think, occurred because you are neither a lawyer nor a legislator. [Laughter.]

We thank you for both of those points and thank you for your testimony.

Mr. Standish, welcome to the subcommittee.

STATEMENT OF JAMES STANDISH, DIRECTOR OF LEGISLATIVE AFFAIRS, SEVENTH-DAY ADVENTIST CHURCH

Mr. STANDISH. Thank you so much.

Chair Andrews, Ranking Member Mr. Kline, other members of the committee, it is an honor to represent the headquarters of the Seventh-Day Adventist Church. There are about 15 million Seventh-Day Adventists around the world. We operate over 600 health care facilities, and we have about 1.3 million students enrolled in our education system.

I am particularly proud of the work that we do for the least advantaged in our world particularly. For example, our hospitals and clinics in sub-Saharan Africa treat over 800,000 HIV-AIDS positive patients every year. That is the outworking of our faith and our Lord and Savior Jesus Christ.

Another commitment that we make as Seventh-Day Adventist Christians is to aim to keep the Ten Commandments under the grace of Christ. That is all 10, including the commandment to rest on the Sabbath Day. Increasingly, however, we are finding American employers unwilling to accommodate our sincerely religious belief, and not just ours, but people of faith across the religious spectrum.

We have heard today from a Muslim woman, a Jewish representative. I am a Christian. If you talk to Sikhs and other Christians, you will find that this problem pervades across the spectrum.

Indeed, you do not have to just take our word for it. The U.S. Equal Employment Opportunity Commission reports that between 1993 and 2006, the number of religious discriminations claims filed with them went up 83 percent. That is a huge increase. During that same period, for point of reference, claims involving racial discrimination went down 8 percent, and other major claim categories also held steady or went down. We have a serious civil rights problem of an increase in the refusal to accommodate the religious beliefs of American workers.

Part of the reason for this is because of the current weak state of the law, which permits employers to arbitrarily refuse to accommodate the sincerely held religious beliefs of employees. The Workplace Religious Freedom Act will fix the loopholes in the current law to ensure that when an American employee comes forward with a faith commitment that they are treated with respect and dignity and that, if they can be accommodated, they are accommodated instead of being marginalized from the American economy.

There are two principal objections to this bill. First, we are told by opponents of the bill that this will result in an increase in litigation on employers. We know that is not the fact for two reasons. First of all, the economics of bringing these cases disfavors their bringing. Particularly, the amounts of damages tend to be very, very low because the employees who are impacted disproportionately are low-income employees. So the amounts of damages, which are lost wages, are very, very small.

And members of the private plaintiffs' bar do not take these cases now. They are not going to take them after WRFA is enacted because the economics do not change.

Secondly, we have an example up and going right now, and that is in New York State where we have a WRFA-like standard. In New York State, we have been told by the Human Rights Commission there that the claims of religious discrimination have actually dropped 4 of the last 5 years. After the WRFA-like standard was implemented, the number of claims dropped 4 of the last 5 years. They dropped on the state basis. They will drop on the national basis because it helps people come together.

Secondly, we are told that if WRFA is passed, it will result in perverse outcomes where third parties are harmed, whether those are gay, lesbian, bisexual employees being harassed in the workplace or an inhibition of patients to gain health care services.

Once again, we know that this claim is incorrect. We know that for two reasons. First of all, the modest standard in WRFA would no means require employers to refuse products or services on a timely basis. The standard just simply is not that strong.

Secondly, once again, in New York, we have the standard up and going, and opponents of this bill have yet to find a single case in which harassment was privileged in New York under the WRFA standard or services were denied.

They have found claims that were brought nationwide over the last 30 years, a very, very small handful. In each case, the plaintiff lost. They would lose, they lost now, and they will lose in the future.

Before I close, I want to show you a picture. I cannot help it. I am a proud dad. These are my daughters. If my daughters grow up and they want to follow the faith of their mother, their two grandmothers, or their four great-grandmothers, how are they going to be treated in the workplace? Are they going to be marginalized? Are they going to be harassed? Are they going to be fired when they could easily be accommodated?

I would suggest to you this afternoon the answer to that question is largely in your hands. If we do not pass WRFA, the problems to Seventh-Day Adventists and other people of faith in the workplace will increase. If you do pass it, we will have a balanced bipartisan

piece of legislation that finds the middle ground to ensure that our value of religious freedom is protected and workers' rights.

Thank you very much, Mr. Chairman.

[The statement of Mr. Standish follows:]

Prepared Statement of James D. Standish,[1] Director of Legislative Affairs, Seventh-Day Adventist Church World Headquarters

Chairman Andrews, Ranking Member Kline and Subcommittee Members, I am grateful for the opportunity to testify in support of the Workplace Religious Freedom Act, H.R. 1431 (WRFA), on behalf of the Seventh-day Adventist Church.

- The Seventh-day Adventist Church has 15 million members worldwide.
- Adventists operate 165 hospitals, 432 clinics and dispensaries, 123 nursing homes and retirement centers, and 34 orphanages worldwide. In addition, Adventists operate three medical schools, three dental schools, 50 schools of nursing and six schools of public health.
- There are 62 Adventist hospitals located in the United States.
- Adventists operate 6,709 schools, 99 colleges and universities, 39 training institutes, with a total enrollment of 1,254,179 students worldwide.
- There are 1,020 Adventist schools in the United States.

I am particularly proud that Seventh-day Adventist healthcare provides critical treatment in some of the world's most impoverished regions. For example, Adventist hospitals and clinics provide care for over 800,000 HIV/AIDS sufferers in sub-Saharan Africa each year.[2] Further, in many areas of the world, Adventist schools provide the only accessible education for children from disadvantaged families.

This practical ministry of healing and teaching is the outworking of our faith commitment that has at its core a trust in the saving grace of our Lord, Jesus Christ. As part of this commitment, Seventh-day Adventist Christians aspire to keep the Ten Commandments under the grace of Christ. This includes resting from secular work on the seventh day of the week as required by God in the Ten Commandments.[3]

While there is debate within the Christian community regarding which day of the week to keep holy, and further if or how to keep the Sabbath holy, there is no debate that throughout church history some Christians have continued to keep the Sabbath day holy on the seventh day of the week (Saturday). Further, there is no debate that the Seventh-day Adventist commitment to setting aside the Sabbath to worship God is based on a sincerely held religious belief.

Today there is significant discussion over if and how the Ten Commandments should be displayed in government buildings. As important as these debates may be, a much more important question is how people are treated when they actually keep the Ten Commandments.

Sadly, the experience of Seventh-day Adventist Christians in recent years indicates an increased hostility to accommodating Sabbath observance. Indeed, the rise in hostility to accommodating the sincerely held religious beliefs of American workers is not limited to Seventh-day Adventist Christians, but rather falls across the faith spectrum. We know this both from reporting done by the various faith communities, and from statistics kept by the United States Equal Employment Opportunity Commission (EEOC) that will be discussed in the next section of this testimony.

I co-chair a coalition of 49 national religious organizations who have come together in support of WRFA. A full list of the coalition members is provided as Exhibit A to this testimony. It is rare that entities with such diverse theological views and public policy priorities agree on any given piece of legislation. Indeed, at this time there may well be no other issue that shares such deep and broad multi-faith support. The increase in hostility to religion in the American workplace has brought this disparate group together to support a vital improvement in the law to protect the religious freedom of America's workers.

Deficiency in the Current Legal Standard

Title VII of the U.S. Civil Rights Act of 1964 as amended in 1972 requires employers to "reasonably" accommodate the religious practices of their employees unless, by so doing, the employer would incur an "undue hardship on the conduct of the employer's business."[4] The Act itself does not define the terms "reasonably accommodate" and "undue hardship," and thus it was the role of the courts to provide clarification.

With scant legislative history to build upon, the Supreme Court found that undue hardship means anything above a de minimis cost or inconvenience.[5] By so doing, the Court greatly reduced the impact of the accommodation requirement.[6]

Further, there is a split among federal courts on the definition of "reasonable" accommodation. Some Circuits have held that in order to be considered a reasonable accommodation for the purposes of Title VII, the accommodation must eliminate the conflict between the religious practice in question and the employer's requirement. The 8th Circuit, on the other hand, recently held that an employer may "reasonably accommodate" by an offer to only partially accommodate the religious practices of employees.[7]

Thus, under the current legal standard, an employee in some jurisdictions faces two prohibitive barriers to successfully bringing a Title VII accommodation claim: First, if an employer offers a partial accommodation the court may hold the offer is a "reasonable" accommodation. In this case, the employee loses, whether or not the employer could have offered an accommodation that removed the conflict entirely. But employers also get a second bite of the apple. Even when a court finds an offer of partial accommodation does not meet the Title VII threshold, an employer wins if he can show that accommodating an employee's sincerely held religious beliefs would result in anything above the most minimal inconvenience.

For employers unwilling to respect the religious diversity of the American workforce, the weakness of the current standard provides a two-pronged gift of legal impunity.

The weakness in the current law created a growing problem of religious discrimination in the American workplace. The U.S. Equal Employment Opportunity Commission reports that claims involving religious discrimination in the workplace increased 83% between 1993 and 2006.[8] In contrast, racial discrimination claims declined by 8% during the same period, and other major categories of claims have held roughly steady or declined.[9]

Thus, the rise in religious discrimination claims is not an artifact of an increasingly litigious society. Rather, the rise in religious discrimination claims while other major classes of discrimination have remained level or falling, indicates a substantive growth in intolerance of religion in the American workplace. This is particularly perplexing as the rise comes at a time when many American employers have implemented programs and policies to advance the acceptance of diversity in the workplace.

Four primary reasons have been advanced to explain the increase in religious discrimination.

• First, the economy increasingly operates on a 24-hour, 7-day-a-week schedule. This schedule necessarily conflicts with people of faith who celebrate particular holy days, whether it be a weekly Sabbath or annual holy days.

• Second, due largely to changes in immigration patterns, we are an increasingly religiously diverse society, and our religious diversity now exists in parts of the nation that were largely religiously homogenous up until relatively recent times. In the case of religious practice, unfamiliarity may breed contempt or at least intolerance. Intolerance towards non-Western religions may be exacerbated by the overlap between religious practice and race, ethnicity and national origin.

• Third, the number of religious discrimination claims saw their largest increase after 9/11 when Muslim and Sikh Americans reported a sharp spike in demands to remove any garb or grooming that would indicate their faith affiliation. Unfortunately, the level of claims reached after 9/11 has not subsided in the years subsequent.[10]

• Fourth, America may be becoming an increasingly materialistic society, in which our family life, our environment, and even our spirituality are becoming subordinated to our mercantile drive.

Whatever the factors behind the meteoric rise in religious discrimination claims, the impact on individuals cannot be overstated. To lose a job does not merely mean losing an income. As one worker put it: "I have been through a divorce, I've buried both my parents, but nothing has been as painful as losing my job, because without work, I've lost my independence." Another stated: "when I lost my job, I didn't just lose an income, I lost my self esteem, I lost my health insurance, I lost my ability to support my children, and I lost my dreams."

WRFA Addresses the Loopholes in the Current Law

The serious increase in religious discrimination claims, with the accompanying personal hardship caused, requires us to close the current loopholes in the law that permit employers to arbitrarily fire American workers in retaliation for them following their faith commitment. WRFA is a simple piece of legislation that has two central provisions:

The first provision defines the meaning of "undue hardship" in Title VII as an accommodation that would require significant difficulty or expense.[11] By clarifying the meaning of "undue hardship," WRFA increases the protection from the current de minimis standard that provides virtually no protection to American workers, to a legal standard that provides moderate incentive to work out an accommodation.

The second central provision of WRFA states that an accommodation of religious practice is not a "reasonable accommodation" unless it removes the conflict between the religious practice and the work requirements.[12]

It is vital to understand how these two provisions work together. For an accommodation to be considered reasonable, post-WRFA, it must eliminate the conflict between the employer's requirements and the employee's religious practice. Thus, for example, an accommodation that would offer a Seventh-day Adventist Christian employee two Saturdays off every month, would not qualify as a reasonable accommodation as it would not remove the conflict. This does not mean, however, that the Adventist employee would prevail in her claim.

Rather, once the accommodation options available to remove the conflict are determined, the court will then analyze whether the employer can implement the reasonable accommodation without incurring a significant difficulty or expense. If the employer can show that removing the conflict cannot be done without incurring a significant difficulty or expense, the employer wins.

In practice, the vast majority of accommodation issues are handled informally in the workplace. The new WRFA standard provides an incentive for reticent employers to seriously explore whether they can accommodate the needs of America's religiously diverse workforce. In the overwhelming majority of cases, accommodations can be worked out with little fuss if there is a willingness—and incentive—on both sides to do so. The employee always has an incentive, as her job is on the line. WRFA provides the necessary incentive to recalcitrant employers to search for an accommodation in good faith.

Objections to WRFA

There are two principle objections to providing protection for people of faith in the workplace.

- First, there are concerns that protection for people of faith will increase litigation, and particularly litigation involving sham religious claims.
- Second, there is concern that protecting American workers will burden third parties.

WRFA Will Reduce, Not Increase, Litigation

WRFA will reduce litigation for three reasons. First, it eliminates the current incentive for recalcitrant employers to refuse to explore accommodation options. Second, it does not change the current financial disincentive for attorneys from the private bar to represent victims. Third, it does not eliminate the legal and financial disincentive to bring sham claims. The experience in New York State bears out the fact that religious discrimination claims drop after the implementation of the WRFA standard.

WRFA Eliminates Incentive to Arbitrarily Refuse Accommodation

Experts in the area of employment law agree that one of the contributing factors to the dramatic rise in religious discrimination claims at the federal level is the weakness of the accommodation provisions as currently understood. Mitch Tyner, who managed more than 200 Sabbath accommodation cases[13] during his career in the general counsel's office at the headquarters of the Seventh-day Adventist Church, states "a contributing factor to the dramatic rise in religious discrimination claims at the federal level in recent years is the weakness of current federal law." Todd McFarland, associate general counsel at the headquarters of the Seventh-day Adventist Church states: "Most of the claims can easily be resolved when there is a will on both sides. The weakness in federal law, however, provides an incentive for recalcitrant employers to hold out rather than working constructively to find a solution. They know that in the remote chance a claim is litigated, the employer holds all the cards."

While there is relatively little incentive for a recalcitrant employer to accommodate the religious beliefs of their employees under current law, this does not deter people of faith in the workplace asserting their rights. This is because people of strong religious conviction are committed to following their conscience. In the words of the Apostles, they believe "we must obey God rather than men."[14] As a result, the remote chance of prevailing under current law does not reduce the number of claims asserted. Rather, the law encourages recalcitrant employers to refuse accommodation, while having little impact on the willingness of the faithful to follow their

convictions. These two forces combine to increase the number of claims under the current weak legal standard.

WRFA provides an incentive to both employers and employees to work out an accommodation if it is possible. Although the rise is religious discrimination claims is alarming, religious intolerance in the workplace remains the experience of a minority of employees indicating that the majority of America's employers value the religious diversity of their workforce and already work out accommodation. WRFA will provide an added incentive to recalcitrant employers to do the right thing before a case results in litigation. WRFA is written to provide additional clarity and thereby reduce misunderstandings. In addition, as discussed below, the economics of bringing religious accommodation cases discourage litigation and virtually eliminates sham religious claims.

WRFA Doesn't Eliminate Financial Disincentive for Bringing Claims

There are significant financial disincentives to bringing religious accommodation cases and these will not change after WRFA is enacted. Damages in accommodation cases tend to consist of lost wages, which are frequently modest because the workers involved are typically on the low end of the wage scale. As a result, finding attorneys willing to bring these cases can be difficult, and it is highly unlikely an attorney would be willing to invest the time and effort to bring a case involving a sham claim. In addition, while courts do not examine the validity of religious beliefs themselves, they do examine the sincerity of the individual's claim.[15]

To date, critics of WRFA have not been able to identify a single sham religion claim that has succeeded under Title VII or its state equivalents during the 35 years the religious accommodation requirement has been in place. The lack of financial incentive to bring a sham claim, combined with the court's power to investigate whether a claimed religious belief is indeed sincerely held, likely explains the dearth of examples. Sham claims are not a factor in accommodation claims to date, and there is nothing in WRFA that would change this reality.

An example helps to illustrate the financial disincentives of brining workplace accommodation cases. If an employee earns $20,000 per annum, and is fired by an employer who refuses to accommodate her religious convictions, and if that employee is out of work for an entire quarter, the damages involved in the case are only $5,000. The expense of going through the administrative process and then litigation seldom justifies the damages involved. It is not surprising that many Title VII accommodation cases brought today are brought by religious entities attempting to vindicate a principle, rather than by attorneys in the private bar. The financial disincentive involved in bringing these cases will not change post WRFA.

Accommodation Claims in New York Dropped Dramatically Post WRFA

If there were any doubts at all about the impact of WRFA, the experience of New York State addresses them. Since adopting the WRFA standard, religious discrimination claims have been lower in four out of five years.[16]

There is no reason to believe the passage of WRFA will increase the number of religious discrimination claims or encourage sham claims. Rather, WRFA will reduce the number of claims as it provides an incentive to work out commonsense accommodations. This is the experience in New York State and it will be the experience nationwide.

WRFA Will Advance Civil Rights, Not Harm Them

It is important to remember when discussing the civil rights impact of WRFA that religious liberty is our first civil right. The Pilgrims fled from Britain to the Netherlands, and from the Netherlands to America in order to experience religious freedom. Roger Williams left Massachusetts to found Rhode Island in order to experience religious freedom. The first provisions in the First Amendment to our Constitution are designed to protect religious freedom. And many Americans can trace our roots back to a family member who fled to the United States to escape religious intolerance. Ensuring that American workers are not arbitrarily forced to choose between their livelihood and their faith is a vital step forward to advancing our core civil right of religious freedom.

Critics of WRFA have raised emotive objections but lack evidence to support them. Specifically, they claim WRFA will privilege harassment and the denial of reproductive healthcare services. On March 20th, 2007, the ACLU circulated a letter opposing WRFA. In the letter, the ACLU referred to a miniscule minority of cases brought under Title VII in the last three decades that involved emotive claims. In every case, the plaintiff lost. There is no rational basis to believe the outcome would be any different post-WRFA. Despite this, the ACLU urges Congress to oppose WRFA because "Congress has no assurance that courts will continue to reject claims that could cause important harm." The ACLU is wrong. Congress has every reason

to believe that claims that would harm third parties will not succeed under WRFA. WRFA will not privilege the denial of products or services to customers. We know this for two reasons.

First, the bill's modest accommodation requirement is insufficient to require employers to turn away customers, let alone compromise patients' healthcare or public safety. Further, there is no rational basis for concluding the bill will privilege the harassment of employees. If there was, the minority faiths currently supporting the bill would be the first to oppose it since our members are vulnerable to religious based harassment in the workplace.

Second, New York State law that tracks the WRFA standard can be observed. Critics of WRFA have not been unable to point to a single incidence in which the NY State law has been interpreted to privilege employees denying customers/patients services or products in a timely manner. Nor have they found a single case in New York where WRFA was interpreted to privilege harassment. It is incumbent on those making remarkable claims to back those claims up with solid evidence. Critics of WRFA have been unable to do so. As such, while the emotive scenarios presented by critics of WRFA may elicit fear, it is an irrational fear.

Opponents of virtually every piece of legislation presented in Congress create a parade of horribles to discourage its passage. Rather than succumb to irrational fear, we must keep in mind the reality of WRFA's modest accommodation standard and the experience at the state level. In the case of WRFA, we have a serious, growing, well documented violation of civil rights occurring. Against this reality, critics parade the most speculative negative outcomes of its passage without a single case to back up their conclusion that WRFA will result in their outcomes. Between the facts presented by the supporters of WRFA, and the emotive fiction of its adversaries, the choice is clear.

Indeed, it is not only the diverse coalition supporting WRFA that rejects the critics' parade of horribles. Governor Eliot Spitzer wrote the following critique of the ACLU's efforts to defeat WRFA when he was New York Attorney General:

"I have the utmost respect for the ACLU, but on this issue they are simply wrong. New York's law has not resulted in the infringement of the rights of others, or in the additional litigation the ACLU predicts will occur if WRFA is enacted. Nor has it been burdensome on business. Rather, it strikes the correct balance between accommodating individual liberty and the needs of businesses and the delivery of services. So does WRFA." [17]

Despite the lack of evidence for the critics' objections to WRFA, the coalition supporting WRFA is not opposed to inserting language into the bill that specifically indicates the WRFA standard is not to be interpreted to require accommodations that would cause harm to third parties—whether they be coworkers or customers. The ACLU has rejected this offer to date, preferring to insist on creating a legal standard that would provide a higher level of protection to selected religious practices they find innocuous and a lower level of protection for all other practices. We believe this approach to be both unjust on its face, and possibly unconstitutional.

Restricted Bill is Unjust & Creates Constitutional Questions

The ACLU's proposed a restricted bill would provide the WRFA standard to a limited set of religious practices which the ACLU selects, while leaving all other religious practices unprotected by WRFA. The restricted approach strikes at the heart of indivisible freedoms because it aims to provide one set of religious practices preferential treatment under the law vis-a-vis all other religious practices.

Specifically, the ACLU proposes to provide WRFA protection to requests to accommodate religious holy day, garb and grooming requirements. This limited bill would exclude all other religious practices from coverage. Among the wide range of religious practices that would be excluded under the ACLU restricted bill are: [18]

- A Jehovah's Witness employee who requests to opt out of raising the flag and pledging allegiance at work;
- A Methodist attorney who requests accommodation not to represent tobacco interests;
- A Quaker (Society of Friends) employee who requests to be transferred to non-military related accounts;
- An Orthodox Jewish woman who requests permission not to shake the hands of male customers;
- A Hindu employee who requests permission not to greet guests with the phrase "Merry Christmas;"
- A Christian employee who requests to be assigned to work that does not involve embryonic research;
- A Muslim hospital employee who requests to be exempted from duty in which she would be present when a member of the opposite sex is unclothed;

• A Christian webpage developer who asks to be reassigned from a pornographic website development project;
• A Muslim truck driver who requests to be assigned to routes that do not involve delivering alcoholic beverages.

These are just a few of the uncovered religious claims, and do not include claims that arise from indigenous faiths, many major Eastern religions and the wide variety of claims arising from the diverse branches of Christianity. To understand the weakness of the restricted approach, it is worth considering sample claims post-passage of the ACLU's restricted WRFA:

Post-passage of a restricted WRFA, if an Evangelical Christian delivery driver requests her employer to accommodate her sincerely held religious conviction to attend church on Sunday, her claim would be analyzed under the WRFA significant difficulty or expense standard. If a Muslim delivery driver working for the same company asked the same employer to accommodate her sincerely held religious conviction that requires her not to delivery alcoholic beverages, her claim would be analyzed under the existing de minimis difficulty or expense standard. As such, the Muslim employee would be much more likely to lose even if the two accommodation requests presented precisely the same challenge to accommodate. It is difficult to understand how anyone could believe such disparate treatment is a just outcome.

Further, it is unclear whether such disparate treatment could withstand constitutional scrutiny under either the Equal Protection or the Establishment Clauses.

In defense of their restricted proposal, critics note that the religious practices covered constitute the majority of claims made in reported Title VII cases over the past three decades. This defense is faulted in two ways.

First, a bill that protects the majority of claims is hardly justification for disfavoring minority religious practices.

Second, it assumes that future accommodation claims will mirror the past. This is a deeply faulted assumption. America's religious demographics are changing dramatically. As immigrants from Asia, Africa, the Pacific and other areas of the world come to the United States, they bring their religious practices with them. It is very likely that prospectively, we will see far more claims from these faith communities as they become established in America. We cannot afford to exclude religious practices from protection simply because they were not prevalent in the U.S. during the 70s and 80s. Indeed, as we go forward, newer faith communities are likely to need the protection of WRFA at least as much—if not more than—established communities.

Disparate treatment is something the ACLU has stood against in the past on issues ranging from free speech to religious liberty. Sadly, they have abandoned their core values and in the process are acting in a manner counter productive to the liberties they claim to protect. Criticism of WRFA is unjustified by the facts, and the proposed "solution" is deeply unjust and likely unconstitutional.

Conclusion

Losing employment is not an insignificant event. Loss of a job can have the most dire impact on a family emotionally, financially, and in their relationships. In recognition of this, our laws have been crafted carefully to protect the disabled, for example, from dismissal without efforts being made to accommodate their needs. And this Congress passed the Employment Non-Discrimination Act to protect gay, lesbian and bisexual employees. It is not too much to ask from a nation founded on the principles of religious freedom for people of faith to be accorded the same respect.

Rather than succumb to the irrational objections of WRFA critics. It is vital that Congress address this very real, well documented problem. Americans from all religious faiths need protection. WRFA provides a modest level of protection to ensure that American workers are no longer arbitrarily forced to choose between their faith and their livelihood.

Today, on behalf of the Seventh-day Adventist Church and on behalf of the religious community writ large, I urge each member of the subcommittee to support WRFA's passage through the House of Representatives and into law. Enough American workers have been humiliated and marginalized for no crime other than remaining faithful to their understanding of God's requirements. Our national values and our common humanity dictate that we provide the modest, commonsense protection encapsulated in WRFA—and that we delay no longer.

ENDNOTES

[1] James Standish is director of legislative affairs for the world headquarters of the Seventh-day Adventist Church. He earned his law degree, cum laude, from Georgetown University, his MBA from the University of Virginia, and his BBA from Newbold College, England.

[2] There are 29 Seventh-day Adventist hospitals in sub-Saharan Africa, and these hospitals are complemented by a number of Adventist clinics and dispensaries. In total, these facilities accounted for 62,912 inpatient admissions, and 1,601,950 outpatient visits in 2004. More than 50% of the patients served in these facilities are HIV positive.

[3] Exodus 20:8—11 (NKJV): "Remember the Sabbath day, to keep it holy. Six days you shall labor and do all your work, but the seventh day is the Sabbath of the LORD your God. In it you shall do no work: you, nor your son, nor your daughter, nor your male servant, nor your female servant, nor your cattle, nor your stranger who is within your gates. For in six days the LORD made the heavens and the earth, the sea, and all that is in them, and rested the seventh day. Therefore the LORD blessed the Sabbath day and hallowed it."

[4] 42 U.S.C. § 2000e(j). (Employers have a duty to accommodate an employee's religious practices as long as they can "reasonably accommodate" the practices and the accommodation does not cause "undue hardship" on the employer's business.)

[5] Trans World Airlines, Inc v. Hardison, 432 U.S. 63, 84 (1977). (Accommodation of religious beliefs requiring more than a de minimis cost to the employer normally results in "undue hardship" and therefore is not required by current law.)

[6] For more on the history of the accommodation provision of Title VII, please see Exhibit B at the conclusion of this testimony.

[7] Sturgill v. UPS, 2008 WL 123945 (8th Cir. Jan. 15, 2008) ("What is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict." Slip Opinion at 6.).

[8] Exhibit C at the conclusion of this testimony contains a year-by-year analysis of religious and race based discrimination receipts received by the U.S. EEO.

[9] See Exhibit C.

[10] See Exhibit C.

[11] Workplace Religious Freedom Act, Section 2 ("* * * the term 'undue hardship' means an accommodation requiring significant difficulty or expense.").

[12] Workplace Religious Freedom Act, Section 2 ("* * * for an accommodation to be considered to be reasonable, the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee.").

[13] A majority of cases did not go to litigation.

[14] Acts 5:29 (NIV).

[15] See, e.g., United States v. Seeger, 380 U.S. 163 (1965).

[16] New York State Division of Human Rights

[17] Eliot Spitzer, "Defend the Civil Right to Freedom of Religion for America's Workers," The Forward, June 25, 1990, at 1, 7. *http://www.forward.com/main/article.php?ref=spitzer200406241125*

[18] List compiled by the Coalition for Freedom of Religion in the Workplace.

Chairman ANDREWS. Mr. Standish, thank you. And thanks for showing us that picture, too. That made us all——

Mr. STANDISH. Cannot resist.

Chairman ANDREWS. Before we go to Professor Norton, I wanted to just comment that I know that our three scholarly witnesses have made a tremendous contribution to this discussion, and we appreciate that very, very much.

I will just pause for a moment after the last three witnesses, and this is record that we would like the world to see about the real meaning of religious diversity in our country.

You know, this is a country that was founded a very long time ago by people who worshipped under the rules of the Church of England and people who worshipped under some religions that followed Martin Luther and his views. That is sort of the only folks that were here, other than the Native Americans, hundreds of years ago.

And they derived a system that yielded today where we have three people, very articulate, very passionate, very sincere, from three very different religious traditions, each of which is respected. We are having a debate today about how that respect should be manifested in the law.

But for those who would doubt the country's true devotion to religious diversity, I would like them to hear the three of you just testify. I think it was moving. It was terrific, and we are very glad that you were here.

Professor Norton?

STATEMENT OF HELEN NORTON, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF COLORADO

Ms. NORTON. Thank you.

I hope to accomplish three objectives with my testimony here today: first, to explain my support for H.R. 1431's overarching goal of amending Title VII to provide greater protections for workers' religious practices for the reasons that the witnesses before me have already very eloquently identified; second, however, also to note my concern that the language as drafted may create significant conflicts with other persons' important civil and reproductive rights; and then finally, to suggest some possible approaches for resolving those concerns.

As a number of witnesses have noted, as a result of the Supreme Court's very broad interpretation of "undue hardship" under Title VII. employee requests for religious accommodation are too often denied, even when they impose only modest costs, and for this reason, amendment to Title VII to restore Congress's original intent to create a meaningful right to reasonable accommodation is long overdue.

But while I fully support H.R. 1431's underlying purpose in this regard, I note my significant concern that the proposal, as currently drafted, may lead to new and different outcomes in cases where requested accommodations conflict with other persons' important civil and reproductive rights. Although the majority of requested accommodations will not pose difficulties of this sort, the Title VII experience to date indicates that some requested accommodations will conflict with coworkers' antidiscrimination interests or patients' health care needs.

And these are very difficult issues because they involve direct clashes between interests that are protected by Title VII as well as under other constitutional and legal rights. These concerns are especially acute given that Congress is considering amending one of our nation's most important civil rights laws.

And to be sure, the plaintiffs' beliefs in these cases are no less sincere and deeply felt than in any others. These cases are different and difficult instead because of the requested accommodations' effect on third parties' civil rights, religious liberties, reproductive rights, or other important health care needs.

Under current law, for example, lower courts have consistently held that employers are not required to accommodate health care workers' religiously motivated requests to decline to dispense contraceptives or provide other health care services for religious reasons when those requests result in delay in or disruption to the delivery of health care services.

Similarly, under current law, lower courts have consistently concluded that police officers' religiously motivated requests to decline certain assignments, such as enforcing the law with respect to disruptions at reproductive health care clinics, pose an undue hardship.

Nor have lower courts under the current Title VII standard required employers to accommodate workers whose religious beliefs compel them to urge the conversion of those with contrary beliefs or behaviors in a way that may not only offend the beliefs of others, but may also undermine an employer's antidiscrimination poli-

cies, as is the case where a worker seeks the accommodation being permitted to condemn homosexuality as immoral to coworkers or to patients, despite an employer's antidiscrimination policy.

Each of these cases was decided under the current Title VII standard. Without clarification, we cannot be confident that the substantial changes proposed by H.R. 1431 would not alter the outcome in these cases. Several factors create this uncertainty

First, H.R. 1431 proposes a new and more rigorous understanding of undue hardship for Title VII purposes, drawing largely from the ADA's narrower definition of undue hardship. The ADA's undue hardship standard reflects Congress's judgment that the need to expand employment opportunities for workers with disabilities by providing accessible facilities and other accommodations justifies the imposition of some economic cost on employers so long as that cost falls short of significant difficulty and expense.

But some of the religious accommodations at issue here impose costs most directly on other coworkers or patients and may or may not impose monetary costs on employers. As a result, without clarification, it remains uncertain how the ADA understanding of undue hardship will apply to conflicts with other persons' civil rights or health care needs.

Adding to this uncertainty is the fact that while H.R. 1431 draws from the ADA factors, it does not track them precisely, and, if anything, it appears to focus even more narrowly on the employer's monetary costs as the measure of undue hardship.

So, again, without clarification, these changes may well result in different outcomes in cases involving conflicts with other workers' civil rights or patients' important health care needs.

I will conclude by suggesting very briefly two possible approaches to resolving these concerns. First, H.R. 1431's definition of "undue hardship" could be amended to expressly make clear that accommodations that impose an undue hardship include practices that conflict with employers' legally mandated or voluntarily adopted antidiscrimination requirements or that delay or disrupt the delivery of health care services.

Alternatively, Congress could require employers to provide the most frequently requested accommodations—and those that do not create conflicts of this sort—unless it can show that the accommodation would pose an undue hardship as rigorously defined under H.R. 1431, and those accommodations include time off or scheduling changes to observe the Sabbath, as Ms. Goldstein described, or requests for departures from uniform appearance standards with respect to religious apparel or grooming, as Ms. Al-Suwaij described.

In short, while I fully agree that Congress should amend Title VII to expand the circumstances under which employers must accommodate employees' religious practices, it should not do so in a way that conflicts with others' civil and reproductive rights.

Thank you.

[The statement of Ms. Norton follows:]

Prepared Statement of Helen Norton, Associate Professor, University of Colorado School of Law

Thank you for the opportunity to testify here today. My testimony draws from my work as a law professor teaching and writing about constitutional law and employ-

ment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, where my duties included supervising the Civil Rights Division's Title VII enforcement efforts.

I hope to accomplish three objectives with my testimony here today: 1) to explain my support for H.R. 1431's overarching goal of amending Title VII to provide greater protections for workers' religious practices; 2) to express concern, however, that the language as drafted may create significant conflicts with other persons' important civil and reproductive rights; and 3) to suggest some possible approaches for resolving those concerns.

As originally enacted in 1964, Title VII simply barred employers from firing, refusing to hire, or otherwise taking adverse action against an employee because of his or her religion—as well as his or her race, color, sex, or national origin. But it soon became clear that more was needed to ensure equal employment opportunity for workers on the basis of religion, and Congress thus amended Title VII in 1972 to require expressly that employers reasonably accommodate an employee's religious practice unless the accommodation would pose an undue hardship to the employer's business.

Indeed, Congress amended Title VII in 1972 in direct response to courts' refusal to require employers to accommodate workers' scheduling requests that would allow them to observe their Sabbath. Senator Randolph, the sponsor of the amendment, highlighted the plight of workers "whose religious practices rigidly require them to abstain from work in the nature of hire on particular days."[1] In particular, he explained the need to correct lower court decisions upholding the firing of workers who could not work on the Sabbath.[2]

Shortly after the amendment's enactment, however, in a case involving a worker's request for a shift change to accommodate his observance of the Sabbath, the Supreme Court defined the term "undue hardship" to mean that an employer is not required to incur more than "a de minimis cost" when accommodating an employee's religious practice.[3] As a practical matter, this interpretation robbed the 1972 amendment of much of its impact: under this standard, an employer need show very little cost to avoid accommodating an employee's observance of the Sabbath or other religious practice.[4]

As a result of the Court's very broad interpretation of undue hardship, employee requests for religious accommodations are too often denied even if they impose only modest costs. An amendment to Title VII to restore Congress' original intent to create a meaningful right to reasonable accommodation is thus long overdue.

But while I fully support H.R. 1431's underlying purpose in this regard, I note my significant concern that the proposal, as currently drafted, may lead to new and different outcomes in cases where requested accommodations conflict with other persons' important civil and reproductive rights. Although the majority of requested accommodations—including, but not limited to, requests for shift changes or leave for religious observances, or departures from workplace appearance policies to accommodate religious practices with respect to apparel and grooming[5]—will not pose difficulties of this sort, the Title VII experience to date indicates that some requested accommodations will conflict with co-workers' antidiscrimination interests or patients' health care needs.

Justice Thurgood Marshall wrote a powerful dissent: Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulations and Act do not really mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion of their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise. Id. at 86-87 (Marshall, J., dissenting).

These are very difficult cases because they involve direct clashes between interests that are protected by Title VII and other constitutional and legal rights. These concerns are especially acute given that Congress is considering amendments to one of our nation's most important civil rights laws, and they thus deserve very careful attention. To be sure, the plaintiffs' religious beliefs in these cases are no less sincere and deeply felt than those in any others. These cases are different instead because of the requested accommodations' effect on third parties' civil rights, religious liberties, reproductive rights, and other important health care needs.[6]

And those effects can be extremely significant. Examples include patients who experience delays in or disruptions to health care services if health care workers decline for religious reasons to dispense contraceptives, decline to assist in performing sterilization procedures, or decline to counsel cancer patients seeking information about harvesting eggs or sperm. Other examples include police officers who, for religious reasons, decline to enforce laws regarding civil disturbances at reproductive health care clinics, or workers in a variety of jobs whose religious beliefs compel them to urge the religious conversion of those with contrary beliefs or behaviors in a way that may not only offend the beliefs of others, but also undermine an employer's antidiscrimination policies.

Under the current Title VII interpretation of undue hardship, employers need not provide accommodations that create conflicts of this type when they impose more than a de minimis cost. But without clarification, we cannot be confident that the substantial changes proposed by H.R. 1431 would not alter the outcome in these cases.

Under current law, for example, lower courts have consistently held that a health care worker's religiously-motivated request to decline to dispense contraceptives or to provide other health care services poses an undue hardship when it results in delay or disruption to health care services, even when the employee argues that the accommodation is the only one that can remove the conflict with his or her religious beliefs.[7] For instance, in Grant v. Fairview Hospital,[8] an ultrasound technician for a women's health clinic held religious beliefs that required him to counsel pregnant women against having an abortion if he became aware that they were contemplating the possibility. His employer agreed that the employee did not have to perform ultrasound examinations on women contemplating abortion, and proposed that he leave the room once he found that a patient was considering that possibility. It refused, however, to allow him to counsel such patients against having abortions. Even though the employer's proposal did not eliminate the conflict entirely—the plaintiff felt religiously compelled to provide counseling to women who told him they were considering abortions—the court found that the accommodation was reasonable because it reflected the employer's good-faith negotiation and compromise that resulted in a change that considered both employee and employer concerns.

Others courts have reached similar conclusions under current law. In Noesen v. Medical Staffing Network/Wal-Mart,[9] for example, in response to the plaintiff pharmacist's refusal to dispense contraceptives for religious reasons, the employer ensured that another pharmacist remained available during the plaintiff's shift to fill prescriptions and answer customers' questions about birth control. The court ruled that the employer satisfied its duty of reasonable accommodation by excusing the plaintiff from filling contraceptive prescriptions, even though the plaintiff argued that the only way to remove the conflict with his religious beliefs would be to relieve him of all counter and telephone duties that might require him to interact with a customer seeking birth control.

Similarly, under current law lower courts have consistently concluded that police officers' religiously-motivated requests to decline certain assignments—such as enforcing the law with respect to disturbances and disruptions at reproductive health care clinics—pose an undue hardship to the law enforcement mission. In Rodriguez v. City of Chicago, for example, the plaintiff police officer declined an assignment to provide security at abortion clinics for religious reasons. The Seventh Circuit found that the employer had satisfied its obligation to provide a reasonable accommodation through the availability of a transfer—without any loss in pay or benefits—to another district without an abortion clinic. The court held that the employer was not required to remove the conflict by providing the employee's preferred accommodation, which was to remain in his current district while declining clinic duty.[10] In a concurring opinion, Judge Posner agreed that this employer had provided a reasonable accommodation, but noted that he preferred a rule making clear under Title VII that a request by a law enforcement officer to refuse an assignment always poses an undue hardship, because of the "loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect." The Seventh Circuit later adopted Judge Posner's view as a matter of Title VII law in Endres v. Indiana State Police.[11]

Nor have lower courts, under the current Title VII standard, required employers to accommodate workers whose religious beliefs compel them to urge the religious conversion of those with contrary beliefs or behaviors, in a way that may not only offend the beliefs of others but also undermine an employer's antidiscrimination policies. For example, in Peterson v. Hewlett-Packard, the Ninth Circuit declined to require the employer to adopt the plaintiff's proposed accommodation where the plaintiff contended that only way to remove the conflict between Hewlett-Packard's diversity campaign and his religious beliefs would be either to require HP to remove

its posters (featuring a photo of an HP employee above the caption "Gay," along with a description of the pictured employee's personal interests and the slogan "Diversity is our Strength") or to allow him to display his concededly "hurtful" messages condemning homosexuality in hopes of changing others' behavior.[12]

Each of these cases was decided under current Title VII law. Without clarification, their outcome under H.R. 1431's proposed new standard remains uncertain.

Several factors create this uncertainty. First, H.R. 1431 proposes a new and more rigorous understanding of undue hardship for Title VII purposes, drawing from the Americans with Disabilities Act's (ADA) narrower definition of undue hardship to mean "an action requiring significant difficulty or expense." [13] The ADA then identifies a number of factors to be considered when determining whether a proposed accommodation requires significant difficulty or expense; these factors focus on the requested accommodation's net monetary cost to employer.[14] The ADA's undue hardship standard reflects Congress' judgment that the need to expand employment opportunities for workers with disabilities by providing accessible facilities and other accommodations justifies the imposition of some economic cost on employers so long as that cost falls short of significant difficulty and expense.[15] But some of the religious accommodations at issue here impose costs most directly on other co-workers or patients and may or may not impose monetary costs to employers. As a result, without clarification, it remains uncertain how the ADA understanding of undue hardship will apply to conflicts with other persons' civil rights or health care needs.[16]

Adding to this uncertainty is the fact that while H.R. 1431 draws from the ADA factors to be considered when determining undue hardship, it does not track them precisely. If anything, H.R. 1431 appears to focus even more narrowly on the employer's monetary costs as the measure of undue hardship. For example, H.R. 1431 as proposed requires consideration of "the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from 1 facility to another." [17] In contrast, the ADA more broadly requires consideration of "the nature and cost of the accommodation needed." [18] Again, the effect of these changes remains unclear when applied to accommodations that conflict with third parties' civil and reproductive rights.

Adding further still to this uncertainty is H.R. 1431's provision that:

For purposes of determining whether an employer has committed an unlawful employment practice under this title by failing to provide a reasonable accommodation to the religious observance or practice of an employee, for an accommodation to be considered to be reasonable, the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee.[19]

But the holdings in cases under current law involving conflicts with third parties' civil and reproductive rights frequently rest on courts' conclusion that an employer's accommodation need not completely remove the conflict with the employee's religious beliefs to be considered reasonable. Indeed, in many of these cases, the only way truly to remove the conflict with the employee's sincerely-held religious beliefs is for the employer to stop providing certain health care services that the employee finds inconsistent with his faith or for the employer to permit the employee to engage in religiously-compelled witnessing or proselytizing activities regardless of the effect on others' beliefs or the employer's antidiscrimination policies. Again, without clarification, this change in the law may well result in different outcomes in cases involving conflicts with other workers' civil rights or patients' important health care needs.

There appear to be at least two possible approaches to resolving these concerns. One possible solution would revise H.R. 1431's definition of "undue hardship" to expressly provide that accommodations that impose an undue hardship include practices that conflict with employers' legally-mandated or voluntarily-adopted antidiscrimination requirements or that delay or disrupt the delivery of health care services.

Another approach might require an employer to accommodate the most frequently-requested accommodations—and those that do not create conflicts of the sort described above—unless it can show that the accommodation would pose an undue hardship as rigorously defined under H.R. 1431 as proposed. These accommodations include scheduling and leave requests to observe the Sabbath or religious holidays, as well as requests for departures from uniform appearance standards to accommodate religious practices with respect to apparel and grooming. Other types of accommodation requests would continue to receive the protections available under Title VII's current standard—employers are, and would continue to be, required to provide such accommodations unless doing so poses more than a de minimis hardship.

In short, while I fully agree that Congress should amend Title VII to expand the circumstances under which employers must accommodate employees' religious practices, it should do so in a way that does not conflict with others' civil and reproductive rights. Again, thank you for the opportunity to testify here today. I look forward to your questions.

ENDNOTES

[1] 118 Cong. Rec. at 705 (1972).

[2] See id. at 705-06 (1972) (statement of Sen. Randolph) ("Unfortunately, the courts have, in a sense, come down on both sides of the issues. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question. This amendment is intended * * * to resolve by legislation—and in a way that I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved."); see also 118 Cong. Rec. 706-13 (1972) (reprinting two lower court cases as examples of decisions to be reversed by the proposed amendments:

Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971) (finding no Title VII requirement that an employer accommodate employees' religious observance and upholding the firing of an employee who declined to work on Sundays for religious reasons) and Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971) (same).

[3] Trans World Airlines v. Hardison, 432 U.S. 63, 85 (1977) ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.").

[4] Indeed, according to Black's Law Dictionary, the term "de minimis" means "trifling," "minimal," or "so insignificant that a court may overlook it in deciding a case or issue." BLACK'S LAW DICTIONARY (Seventh Edition).

[5] Justice Marshall's list in Hardison of the most common types of accommodation requests remains largely accurate today: "In some of the reported cases, the rule in question has governed work attire; in other cases it has required attendance at some religious functions; in still other instances, it has compelled membership in a union; and in the largest class of cases, it has concerned work schedules." 432 U.S. at 87.

[6] Note too that these concerns arise only with respect to requested accommodations—i.e., requests that an employer depart from its religiously neutral policies to accommodate a religious practice, observance, or other behavior. An employer may not fire, refuse to hire, or otherwise target an employee for an adverse employment action because of that employee's beliefs, no matter how unfamiliar or even disagreeable the employer may consider those beliefs. See, e.g., Buonanno v. AT&T Broadband, 313 F. Supp. 2d 1069 (D. Colo. 2004) (holding that Title VII does not permit employer to fire employee who declined to sign diversity policy requiring him to affirm that he "value[d]" all differences when his religious beliefs held that some behaviors and beliefs are sinful); Peterson v. Wilmur Communications, Inc., 205 F. Supp. 2d 1014 (E.D. Wis. 2002) (holding that Title VII does not permit employer to demote employee upon learning of employee's religiously-motivated belief in white supremacy).

[7] On the other hand, of course, if accommodating a health care worker's request would not delay or disrupt the provision of health care services, it would not pose an undue hardship.

[8] 2004 WL 326694 (D. Minn. 2004).

[9] 232 Fed. Appx. 581 (7th Cir. 2007); see also Shelton v. University of Medicine & Dentistry of New Jersey, 223 F.3d 220 (3rd Cir. 2000) (holding that the employer hospital satisfied its obligation to provide a reasonable accommodation to a staff nurse whose religious beliefs "forbade her from participating directly or indirectly in ending a life" when it offered to transfer her to a position that did not involve abortions or sterilizations).

[10] 156 F.3d 771 (7th Cir. 1998); see also Parrott v. District of Columbia, 1991 WL 126020 *3 (D.D.C. 1991) ("Title VII's guarantee of de minimis accommodation does not contemplate the type of dispensation Sergeant Parrott requests from the police force"—i.e., to be exempted from enforcing law regarding civil disturbances and demonstrations at abortion clinics).

[11] 349 F.3d 922 (2003) (holding that the state police had no duty to accommodate a police officer's request that he be allowed to refuse assignment to a casino for religious reasons).

[12] 358 F.3d 599, 606-08 (9th Cir. 2004).

[13] 42 U.S.C. § 12111(10) (A).

[14] 42 U.S.C. § 12111(10) (B) of the ADA identifies these factors as follows: "(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity."

[15] 42 U.S.C. § 12111(9) of the ADA provides that "[t]he term 'reasonable accommodation' may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

[16] As written, H.R. 1431 creates a duty of reasonable accommodation only with respect to employees or applicants for employment who can perform the "essential functions" of the job with

or without reasonable accommodation, leaving employers free to argue that the inability to perform certain duties for religious reasons means that that employee cannot perform the job's essential functions. But the bill goes on to provide that "the ability to perform essential functions" should not be considered compromised by "practices that may have a temporary or tangential impact on the ability to perform job functions." H.R. 1431, section 2(a). Without clarification, it is difficult to predict with confidence the meaning of "temporary or tangential impact." For example, would it require accommodation of a pharmacist's request to decline to dispense contraceptives if such contraceptives constitute only a small percentage of the pharmacy's sales, or a nurse's request to decline to assist in performing tubal ligations or vasectomies if such surgeries constitute only a small percentage of a hospital's health care services?

[17] H.R. 1431, section 2(a). H.R. 1431 goes on to identify a shorter and arguably narrower list of additional factors to be considered in determining undue hardship for Title VII purposes as compared to the ADA undue hardship factors listed above in note 14: "(B) the overall financial resources and size of the employer involved, relative to the number of its employees; and (C) for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities."

[18] 42 U.S.C. § 12111(10) (B) (i).

[19] H.R. 1431, section 2(b) (emphasis added).

Chairman ANDREWS. Well, thank you, Professor.

And thank you, ladies and gentlemen, for an excellent series of testimonies.

We are going to now go to questions.

I want to focus on one of the hypotheticals that Mr. Standish raised, and I am going to embellish it a little bit. Say, we have a trucking company that has 100 drivers, and the trucking company serves any number of routes—to grocery stores, to retail outlets, and to some liquor stores—and the trucking company employs a devout Muslim who requests not to be assigned to drive the routes delivering liquor for religious reasons.

Mr. Gray, as you understand the present interpretation of Title VII, if the employer denied that accommodation and the employee sued, would the employee win or lose that suit to force the accommodation?

Mr. GRAY. I think your example, Mr. Chairman, would depend on some further facts.

Chairman ANDREWS. What would you want to know?

Mr. GRAY. I would want to know what other route drivers would be available to pick up that route.

Chairman ANDREWS. All right. Let us say that there would be at least five or 10 others who could do the same route without any significant disruption.

Mr. GRAY. I think with that, there is a significant chance that that accommodation, I think, stands.

Chairman ANDREWS. Do you think it is clear that it does?

Mr. GRAY. Well, I think that depends on the facts, and I think it would take more facts than we have time to go into.

Chairman ANDREWS. Well, good lawyers can disagree. You are one. I am probably not. My own interpretation, as I read the de minimis standard, is the employee loses, and I think that is what it says, and——

Mr. GRAY. Well, I think, Mr. Chairman, if you look at Hardeson and then look at the cases interpreting Hardeson—we could take the Sturgill case that just came out from the Eighth Circuit—it——

Chairman ANDREWS. The UPS driver?

Mr. GRAY [continuing]. Is not as de minims—it may be a bad choice of terms—not as small as the Hardeson case chose to characterize it.

Chairman ANDREWS. But if go to one of the points Mr. Standish made, there is a good chance that this truck driver employee is going to need a contingency lawyer to bring his claim, and with that degree of uncertainty about the outcome, it is going to be very difficult to get representation.

I want to go to Professor Norton and ask her this question: If we were to adopt one of your two alternatives to the bill before the committee, which, as I understand it, would specify a higher level of protection for scheduling issues and for dress issues, appearance issues, would the plaintiff win under your proposed alternative or not?

Ms. NORTON. Your trucking plaintiff?

Chairman ANDREWS. Yes.

Ms. NORTON. Right. Well, the first question is what is the cost, and, as you pointed out, if the employer can identify anything more than de minimis cost, minimal or trifling cost, that employee is at risk of losing the case, which is one reason you may want to go to a non-targeted approach.

Chairman ANDREWS. In other words, the short answer is you do not know, but there is a pretty good risk the employee would lose the case? Is that what you said?

Ms. NORTON. Right, depending on what the answer is to what the cost is.

Chairman ANDREWS. Let me go to another one of Mr. Standish's hypotheticals.

First of all, do you agree, Mr. Standish, that under the trucking-liquor example that the Muslim employee would lose under present law?

Mr. STANDISH. I do. I am a lawyer myself, and I would love to be the person handling the company side of that claim because if you cannot come up with, you know, above a de minimis customer inconvenience for just about anything, you are just really not trying. If you went to a targeted approach, though——

Chairman ANDREWS. How about this, though? How about an Orthodox Jewish person goes to work in a Wal-Mart, and she is assigned to be the Wal-Mart greeter, and she declines to shake hands, because of her religious faith and religious tradition, with people as they come in, and she says, "Well, look, I will work in the shoe department. I will work in the clothing department, appliances, whatever, but I just do not want to be the greeter because it does require me to shake people's hands."

Mr. Standish, do you think that she wins or loses that case under present law?

Mr. STANDISH. I think that that, once again, could be a close call depending on what their other staffing requirements are and what her skills are.

Chairman ANDREWS. Wal-Marts typically have hundreds of employees, and I would think that there would be plenty of people to be the greeter.

Mr. Gray, do you think the plaintiff wins or loses that case under present law?

Mr. GRAY. Without sounding too much like a lawyer, Mr. Chairman, I am not——

Chairman ANDREWS. Go ahead.

Mr. GRAY [continuing]. Sure I want to comment on if that is a particular case or with Wal-Mart in particular, but if I took——

Chairman ANDREWS. Well, let us say a store that employs greeters that has a big W in front of its name and——

[Laughter.]

Mr. GRAY. Fair enough. I think it goes to the cost. I think Professor Norton talked about it. The problem, actually, under the proposed legislation is the current test, Mr. Chairman, involves a balancing test, and what we are seeing in the work place is the company and the employees often are getting it done without having to go to plaintiffs' lawyers.

Chairman ANDREWS. But under Ms. McCarthy's bill, would not the retailer who will go nameless have a burden of showing there is some substantial cost, and I do not think they could do that in a case where there are hundreds of other employees, any of whom could be the greeter, and reassigning the woman in question to another department where she did not have to shake hands would be a pretty easy thing to do. Don't you think the retailer would lose the case under Ms. McCarthy's bill?

Mr. GRAY. Well, yes. I think under the bill, Mr. Chairman, if you cannot point to an identifiable cost—that is a term that I think is going to get us into a lot of trouble down the line. Now the current standard, I think, gives a more give-and-take and allows you to sort of delve into the facts.

Chairman ANDREWS. I agree with that, although I think a lot of us think it is more take than give when it comes to religious rights, which is why we feel strongly about this.

But I thank you very much. I appreciate all these good lawyers answering these questions.

I recognize Mr. Kline for 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman. You are not going to suck me into that today. Not today.

Except I would echo your comments about Ms. Goldstein and the reason that she was so on point is because she was neither a legislator nor a lawyer, and I would emphasize the latter was the problem. But Chairman Andrews and I have this discussion an awful lot.

I want to add to his comments to the three of you, if I can use the term lay witnesses here, the three of you in the middle. It was absolutely terrific. It was uplifting to hear all of your testimony. The diversity that is shown by your presence is, again, emblematic of the United States of America.

And, Ms. Al-Suwaij, you coming from Iraq and your comments are particularly meaningful, and I would hope that you can wear the hijab everywhere all the time in public anytime and proudly in the United States and at work, whether at work or elsewhere.

I am impressed very much with the bipartisan nature of this bill. The authors of the bill not sitting exactly in the same place in our political spectrum speaks an awful lot to the concerns that are here.

And, again, to the witnesses for a terrific testimony, great compelling stories. And, of course, as always, from Professor Norton, terrific insight. Mr. Gray, we are very glad to have you and Mr. Foltin as well.

But, Mr. Gray, you seem to be the only representative here for the employers' concerns, the business concerns. I have a couple of minutes. I just want to go to a couple of questions.

One, I thought your testimony talking about the framework and its comparison with the language of WRFA and the Americans with Disabilities Act was very interesting, where you pointed out, for example, that accommodation of the ADA is designed to enable an employee to work whereas religious accommodations excuse employees from their jobs, a distinction that may not be readily apparent to everyone.

And in your testimony, you spent a great deal of time talking about undue hardship, identifiable increased costs, some of the same issues that Professor Norton was talking about perhaps from a different perspective. So I have two questions if I can get them in.

One is, with respect to the reasonable accommodation-undue hardship issue, could you expand a little bit on the differences in the language in WRFA and in ADA?

And then my second question—I will just get to it now so you can try to squeeze them both in—from the employer's perspective, what would you view as the biggest concern of employers with WRFA language as it is now?

Mr. GRAY. Thank you, Congressman Kline.

With respect to your first question, the language within WRFA adopts the "essential functions" of the job, adopts "undue hardship," adopts a lot of the terminology of the ADA. However, as I was alluding to in my initial comments, it is very difficult to take situations talked about by other folks here and try to put an identifiable cost on them.

In the ADA's context, companies are able to look at the particular cost, make a determination whether or not it provides an undue hardship, and then make the different determination. The issues that Professor Norton talked about, the effect on other employees within the workplace, much more difficult, and the language within WRFA does not provide for evaluation or that type of balancing of those costs, and you actually could lead to a situation where you are favoring one religious person within the workplace as opposed to others.

With respect to your second comment, I think the largest concern on behalf of employers is the cost and the disruption to the workplace, though well intended, but the disruptions to the workplace that businesses, small and large, as noted earlier, 15 employees on up, will feel in trying to adopt the terms within WRFA. It was done initially to try to clarify post-Hardeson the burdened companies face.

However, it does not go as far as it needs to to clarify that. So I think, in answer to your question, the cost in disruption to the workplace, I think, is the biggest concern of employers throughout the United States, as the language is now.

Mr. KLINE. Okay.

Thank you very much, Mr. Chairman. I yield back.

Chairman ANDREWS. I thank my friend.

The Chair is proud to recognize one of the two authors of the bill, the gentlelady from New York, Ms. McCarthy.

Mrs. MCCARTHY. Thank you, Mr. Chairman.

Before I ask my questions, I want to thank Chairman Andrews for working with me and holding these hearings.

And I do understand the issues that are facing each and every one of you, and it was making me think that for the first time in 14 years, I was able to get a gun safety bill passed through this House and the Senate and the president signed it in January, and the reason I got it passed was because I worked with the NRA. Now that is a very, very odd relationship, the NRA and me.

What I am trying to say is from hearing and listening to your testimony, we are not that far apart on what we can do to accommodate, to make this a bill that can, in my opinion, help the American people, all Americans, all people, and so I think there is something that we can work with.

You know, that is why we have hearings like this so that we can hear the concerns of those that have the concerns and try and see if we can come up with the language to accommodate everybody so that, in the end, hopefully, we will have a good bill because there are problems out there.

And in New York, as Mr. Standish has said, we have been doing it. We have worked at it. We have seen the complaints come down. So it is not a difficult situation.

So, with a question to Mr. Standish—and, actually, Richard Foltin—certainly, Mr. Gray, if you would like to come in on that—being that the supporters of WRFA are willing to add language indicating that the provisions are not to be interpreted in a manner that will result in harm to third parties, I think that is something that we can try to work out together. Would you be——

Mr. FOLTIN. Yes. Thank you, Congresswoman.

Let me say that, first of all, I think as a preliminary matter, the groups that have formed the coalition, we do not agree with some of the analysis in terms of what WRFA would do, and I think if one looks at the cases, one finds remarkable consistency.

The kinds of cases Professor Norton has talked about, which have been decided negatively, have not turned on the fine point as to whether or not there is a de minimis cost to the employer or not. It has really been quite striking at how strongly they speak about how no employer could be possibly expected to have to deal with a workplace where employees are degrading one another or essential services are being denied.

But, having said that, we all understand that no piece of legislation is perfect and that there are things that are clear to one party, may not be clear to another, and so it may well be—in fact, it is the case—that speaking for the coalition, we are very prepared to seek ways to clarify this legislation so as to remove the possibility of the bill being interpreted in a way that would be unfair to third parties or to other employees.

Having said that, Congresswoman, I think one of the problems in getting there from here has been the approach that has been taken, frankly, by some of those who have raised those concerns. That is that they have not been simply interested in the kind of clarification that Professor Norton has spoken about, but have really wanted to write out of this legislation the ability of some Americans to come to court to even try to make the case how they can

be accommodated without harm to third parties or other employees, and that, I think, from our perspective is an untenable approach.

If we can get to the place where we agree that perhaps by adding provisions to the "undue hardship" definition so that it is clearer than it is now for those that are concerned, that it is an undue hardship if third parties are materially harmed, services are materially delayed, or made unavailable, if it is made an undue hardship criterion that there is a disruption in the workplace, if we can agree that those are the kinds of approaches that ought to be taken, then I think that there is a way to go from here.

Mrs. MCCARTHY. And I agree with you on that. You know, again, certainly listening to Professor Norton, I think there is a way of accommodation. I also know that in a perfect world, we can sit down and negotiate and come out probably with the right words. I also know through this committee work and certainly the committee work on the Financial Services if we come out with a bill and no one really is complaining, but no one is really happy with it, basically, it is usually a good bill. That is the way things go around here.

But, with that being said, I am sure this committee will continue to work on it. I think it is a good bill. I already know it is working in New York, and I think we can make it accommodating for the rest of the country.

Mr. Standish, do you have any——

Mr. STANDISH. I agree with you, and as Mr. Foltin indicated, we are willing to negotiate. The trick here is who are we negotiating with and when is the deal done because there are opponents to WRFA who will not be happy unless it is a restricted bill that only covers religious beliefs that they believe are innocuous. In other words, it creates a two-tiered system where some religious beliefs or practices get preferential treatment over others. That is a nonstarter.

However, adding clarifying language, I think, is absolutely very, very doable, as long as we can be assured that we are negotiating with the folks who are in the position to make a deal without sort of making concessions and then still having the same opposition we already have currently.

Mrs. MCCARTHY. Thank you.

And I am looking forward to working with this committee to clarify certainly the third party, and, hopefully, we can get that done.

Thank you.

Chairman ANDREWS. I thank the gentlelady, and I thank her for the spirit of her questions. I mean, I think it is very significant that Mr. Souder, who is a devout Republican and a very conservative member, and Ms. McCarthy, who is a moderate Democrat from Long Island, a devout Democrat——

[Laughter.]

Chairman ANDREWS [continuing]. Have worked together on this. I think we have had very legitimate issues raised from the employers' point of view, from the point of view of protecting civil liberties of others, and I think it is quite possible we can work together and get this done.

So I also hear Mr. Standish. We sort of have a rule when it comes to negotiation. We trade ideas for votes, to be perfectly blunt, and, you know, if people want to be part of a discussion, they need to get on board and vote for it. So that is the way it works.

The Chair recognizes the gentlelady from California, Ms. Sanchez, for 5 minutes.

Ms. SANCHEZ. Thank you, Mr. Chairman.

And I want to apologize to the panel if some of these questions have been asked. I have been running in and out, but I have had an opportunity to look at the written testimony.

And, Professor Norton, I specifically appreciate the concerns that you have raised about the impact of the Workplace Religious Freedom Act that it may have in circumstances where an employee's requested accommodations conflict with another person's civil or reproductive rights. I personally do not want to see a woman be denied birth control, for example, by a pharmacist or lectured by an ultrasound technician, but I also do not want to see employers discriminate against employees for their religious beliefs.

Can you clarify the difference under current law between the clear rule that employers cannot discriminate based on an employee's religious belief and the very different rule with different standards governing an employer's responsibility to make affirmative accommodations for an employee's religiously felt need to, for example, proselytize about white supremacy in the workplace or call a woman seeking birth control a murderer?

Ms. NORTON. Certainly, Congresswoman. Title VII with religion basically requires employers to do two things. First, it makes clear that employers may not discriminate against an employee because of their religious belief, their state of mind, what they believe to be true as a religious matter, nor, of course, may they discriminate against an employee because of his or race, color, sex, or national origin.

Title VII, after the 1972 amendments, also created an additional duty on employers with respect to religion only of the five classes protected under Title VII. It made clear that employers also have a duty to reasonably accommodate the religious practices, the act, the behaviors, the observances of an employee unless to do so would create an undue hardship. And among other things, one of the things that we are wrestling here today with is how broadly or how narrowly should "undue hardship" be defined for these purposes.

But that is a balancing inquiry. An employer, you know, has an absolute duty not to discriminate against an employee because of his interreligious beliefs, no matter now unfamiliar or incomprehensible or even disagreeable he or she finds them.

So, for example, one court, correctly in my view, found that an employee could not under Title VII demote an employee once the employer found out that this employee was a member of the Church of the Creator. The employer found those religious beliefs repugnant, as do I, but, nonetheless, Title VII protects freedom of conscience.

On the other hand, if that employee had asked for an accommodation allowing him to proselytize in the workplace, to share his views about white supremacy in the workplace as a matter of reli-

gious conscience, I believe that certainly under current law the employer would not have to do so because that would surely impose more than a de minimis hardship on the employer and its coworkers, and what we are trying to figure out is to predict what would happen if we changed the undue hardship standard.

Ms. SANCHEZ. Thank you.

In 2004, an employee sued Hewlett-Packard for terminating him after he refused to remove antigay posters from his workstation. The plaintiff claimed that Hewlett-Packard engaged in disparate treatment by terminating him because of his religious views and that the company failed to accommodate his religious beliefs.

The case was resolved to uphold the company's reasonable workplace policy, and knowing the facts of this particular case, how do you believe it might turn out differently if the proposed WRFA standards were applied?

Ms. NORTON. The answer is I do not know, which is why I would love to see a clarification. We know how it comes out under the current standard. We know that the employee lost and the employer was not required to abandon its diversity campaign, nor was it required to allow this employee to deliver what the employee conceded were hurtful messages about homosexuality in the workplace and his effort to try to change other people's behavior. We know how it turns out under the current standards.

This bill proposes to change that standard substantially in order to change outcomes in a number of cases, and I agree that we should change the outcomes in a number of cases. It is too hard for workers to get their religious practices accommodated in the workplace, but I do not know if it would change the outcome in that particular case, and if it would, I would find that troubling.

Ms. SANCHEZ. Thank you.

My last question for Mr. Foltin. In explaining your current version of WRFA in your written testimony, you indicate that the claim of a pharmacist who is fired because he chooses not to dispense birth control or emergency contraception would not be sustained under WRFA, and you explained that for the customer whose prescription is not filled, this would constitute a possible significant difficulty or expense.

My concern is whether or not under WRFA as written, the court could take into account the difficulty to the customer as opposed to merely the difficulty of the employer. It is not clear to me that the language of the bill requires or even permits a court to consider the difficulty to the customer, and assuming that the employer lost only a few customers a year due to his employee's religious beliefs, might a court find that the employer did not face an undue hardship?

Mr. FOLTIN. Thank you, Congresswoman. I think a response to that is that, in terms of whether there is an undue hardship and what would be an undue hardship under WRFA, an inability of the employer to provide the service or product that it is in the business of providing will be an undue hardship so that I think it falls well within the criteria that we have placed within WRFA that, in fact, where the employee would be put in that position and these third parties, this clientele, were being turned away that, therefore,

there would be an opportunity, were the clients held to be denied the service.

Now, on the other hand, what we do think WRFA does strengthen is the obligation of the employer to try to find a way to accommodate the employee in a way that does not harm those third parties, and in doing that, it does very much what the American Pharmacist Association says the correct policy should be, which is that they support the ability of a pharmacist to excuse him or herself from certain activity, but also they believe that comes with the responsibility for the pharmacy, for the company to assure patient access to legally prescribed therapy, and we believe that is the correct result.

Sometimes the employee will not be able to be accommodated, and in that case, clearly, that employer under the current law and under WRFA will still be entitled to require that employee to provide the service.

Ms. SANCHEZ. If I could, Mr. Chairman, I request 30 seconds.

Chairman ANDREWS. Yes, we will indulge in one more question.

Ms. SANCHEZ. Thirty seconds?

Chairman ANDREWS. Sure.

Ms. SANCHEZ. It is just a follow-up question.

So, in your understanding, undue hardship would include even the lost of just client who was refused services?

Mr. FOLTIN. Yes, I think that if a client is being turned way, if the business is providing a service and you are not able to provide that service, that is an undue hardship for the employer because it is not going to play out just in the one case. It is going to play out on an ongoing basis.

Ms. SANCHEZ. Thank you very much.

Chairman ANDREWS. I appreciate it. It strikes me in listening to the excellent questioning from both sides that there is a pretty broad consensus on intention here. There may be some disagreement over whether the language accomplishes that intention, how it might better do so, but I thank the gentlelady for her very elucidating questions.

The gentleman from Pennsylvania, Mr. Sestak, is recognized for 5 minutes.

Mr. SESTAK. Thank you very much, Mr. Chairman.

Ms. Norton, I really enjoyed everyone's testimony, but, in yours, you talk—and I agree about liking the concepts behind this bill—about targeted approaches. You do not in your testimony—and I do not think in the written either that I could find—talk about the language of accommodating tangential or temporary impacts upon job performance in that this bill would let you accommodate that. Could you speak to that because, in my mind, I thought some not insignificant concerns, and I am not sure anybody even addressed that language here. It may bode more of a problem than maybe the word "undue hardship."

Ms. NORTON. Certainly, Congressman.

As written, H.R. 1431 creates a duty of reasonable accommodation only with respect to an employee who can perform the "essential functions" of the job with or without reasonable accommodation, and this leaves employers free to argue that the inability to perform a certain job duty, like dispensing contraceptives or some-

thing like that, for religious reasons means that an employee cannot perform the job's essential functions.

But—I think this is what your question goes to—the bill goes on to provide that this ability to perform essential functions should not be considered compromised by practices that only have a temporary or a tangential impact on the ability to perform job functions.

And as far as I know, this phrase does not appear in any other federal statute, so it is hard to predict with any confidence how it would play out, and it does invite some questions—at least it is hard to predict with confidence how it would play out.

For example, would it require accommodation of a pharmacist's request to decline to dispense contraceptives, if contraceptives only make up a small portion of that pharmacy's sales? Or would it require an employer to accommodate a nurse's request not to participate in tubal ligations or vasectomies, if those services turned out to be only a small percentage of a hospital's services?

It is not clear to me, and I would be happy or I would feel more confident about how this is all going to play out if it were clarified.

Mr. SESTAK. Clarified that phrase also, as well as undue hardship?

Ms. NORTON. Yes, sir.

Mr. SESTAK. Mr. Foltin?

Mr. FOLTIN. May I just comment on that?

Mr. SESTAK. Yes. I knew you were going to jump in there.

Mr. FOLTIN. First of all, if we are dissecting the essential functions language, I think it stands for the principle no good deed goes unpunished because that language was put in in an effort to meet concerns coming from the business community which had pointed out that there was no essential function language in existing religious accommodation law, unlike the Americans with Disabilities Act.

If I say in the business community, I am not going to get to my esteemed colleagues here to my left.

But I think the essential point about the essential functions provisions sort of provide the threshold. That is it is the definition. You do not have to go into the reasonable accommodation-undue hardship analysis of whether or not the employee is going to receive the accommodation if you can show that they are not able to fulfill the essential functions of the job.

In other words, you do not have to hire unqualified employees and you also do not have to hire, for instance, a person who is being hired to be a weekend night watchman when we know they are a Sabbath observer and they are not going to be able to work either Saturday or Sunday.

So whatever that language may mean—and it was put in to deal with concerns about Holy Day observance and not allowing employers to say in the larger context if that is a per se bar to providing accommodation, it is simply a threshold.

So the concerns about the pharmacy, for instance, will still need to be resolved even if the employee were to be found to be able to fulfill the essential functions of the job in the context of the undue hardship and reasonable accommodation analysis.

Mr. SESTAK. I appreciate that and also the phrase no good deed goes unpunished. However, the phrase I am most concerned about with this language, which is actually raised in one court case. is the phrase that someone could use this language for heaven can wait, and that is used persistently in the sense to, you know, permit the pharmaceutical person to say, you know, "It tangentially impacts the job of the pharmacy, if you are able to interpret now saying, "That is just a tangential part of my job. So, therefore, I can accommodate that in my pharmacy."

Ms. Norton, you know what I am saying here.

And so I am struck more by this is a good bill, a needed bill, and I was struck when we got our first Muslim on my first command of a ship, a small boat, only about 100 men, and we had to begin to find out—and there is no room on there for religious services—where could he practice to pray to Mecca enough times of day in privacy? So accommodation needs to be done. I am just taken that it probably needs strengthening of words and clarification for both undue hardship and this phrase.

Thank you.

Chairman ANDREWS. I thank the gentleman.

I want to extend my appreciation and the committee's appreciation to the witnesses. The testimony was well thought out, very helpful to the committee, as was the first panel, for those that are still here.

As the committee proceeds on its deliberations, I am certain that we are going to call upon you for further advice and guidance, as we try to work through these problems. I want to express my appreciation again to the witnesses for traveling a great distance, putting in a great deal of preparation, and showing us the way the process is supposed to work.

Many people think that American politics is about battles, and sometimes it needs to be, but when it is at its best, it is about the exchange of ideas, refinement of positions, and I think you have given us a great opportunity to do that today.

I would ask my friend, the ranking member, for any concluding comments he may have.

Mr. KLINE. Thank you, Mr. Chairman.

Again, my thanks to the witnesses. It was really a great panel.

It is incumbent upon us as we are, in fact, creating law, making statutes, that we be as clear as we possibly can to the points that were raised by Professor Norton and others. We would like the statute to come out and be clear so everybody knows where they stand, and it is always a challenge here. No matter how many lawyers we have up here or out there, it is always a challenge to get it right here and, frankly, not to leave it to all those lawyers to try to sort out what we meant. So I think there is more work to be done here.

Again, I am heartened by the sort of bipartisan approach that we need to do something here. As is always the case, we want to do it right.

So, again, thanks to the witnesses.

Thanks to you, Mr. Chairman.

Chairman ANDREWS. Thank you as well.

As previously ordered, members will have 14 days to submit additional materials for the hearing record. Any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with the majority staff within seven days.

Without objection, the hearing is adjourned.

[The statement of Mrs. McCarthy follows:]

Prepared Statement of Hon. Carolyn McCarthy, a Representative in Congress From the State of New York

Thank you Mr. Chairman and fellow members of the subcommittee. I welcome the opportunity to testify about the Workforce Religious Freedom Act ("WRFA"). I would first like to thank my colleague, Mr. Souder. We have worked closely on this bill and garnered bipartisan support for it. This bill simply stated is pro-business, pro-faith and pro-family. It is an important piece of legislation and its passage is long overdue.

I felt the need to get involved-with over 40 diverse organizations-in favor of this legislation because I have heard of many individuals who are forced to choose between their job and their religion. Nowadays we have a 24 hour, 7 day a week work environment that clashes with religious observances. And unfortunately since 9/11 our Muslim and Sikh friends have been the target of backlash.

Our great nation was founded under the principles of freedom, including religion. We as members of Congress have a responsibility to ensure people are able to freely practice. Asking a person to leave their religion at their door is impossible and something they should not be asked to do.

In 1964 Congress realized the importance of religion to workers by providing Title 7 of the Civil Rights Act. Simply stated employers are not allowed to discriminate based on race, gender, color and religion. Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer. But as the courts began to rule on cases they ruled that most "hardships" are an "undue hardship." This has left religiously observant workers with little legal protection.

WRFA will reestablish the principle that employers must reasonably accommodate the religious needs of employees. It would redefine undue hardship as something that imposes significant difficulty or expense on the employer or that would keep an employee from carrying out the essential functions of the job. An important point to make is that third parties would not be adversely affected. I have been hearing and reading a lot regarding the bill from organizations, which I agree with a majority of the time, that third parties would be affected. I am a pro-choice member of Congress and believe a woman should be able to choose what happens to her body especially in case of an emergency. This legislation would not prevent a woman from receiving an emergency abortion, obtaining birth control medication or emergency contraceptives.

For example, if a nurse has a religious objection to participating in an emergency abortion she would not be covered under WRFA. Performing an emergency surgery is an essential function of nurse's job. A court would not hear a case brought by a nurse, who feels wrongly dismissed by a hospital because the nurse walked away from a patient in need of emergency care. A patient who is suffering places a significant burden on a hospital and the hospital would have to assist them. If a woman goes to an abortion clinic she can be subjected to violence and threats. Unfortunately there has been a need to have the clinics protected. This law would not allow a clinic to be unprotected. If a police officer had a religious objection with guarding the clinic his request for removal is accommodated as long as a replacement was possible. If not, then the officer must accept the assignment. Another concern I have heard regarding the bill is women would have difficulty obtaining birth control because this bill would protect a pharmacist who feels it is against their religion from filling the prescription. Currently, The American Pharmacists Association's policy is that pharmacists can refuse to fill prescriptions as long as they make sure customers can get their medications some other way. This is exactly the point of the legislation!! This bill would allow a pharmacist who has a strong religious objection to filling the prescription from doing so without any affect on the individual. A woman would still receive her prescription.

I'd like to point out that the bill does not apply to employers who have fewer than 15 employees. This protects against circumstances in which an employer would not have the personnel in place or is located in a rural area. So, for example, a pharmacy would operate under their association's policy. It is time to allow people to once again practice their religion without fear of losing their job.

Once again I thank you for the opportunity to talk about legislation that is pro-business, pro-faith and pro-family. I welcome any questions you may have.

[Additional submissions of Mr. Kline follow:]

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INSTITUTE FOR PUBLIC AFFAIRS

February 11, 2008

Hon. Robert Andrews, Chairman
Hon. John P. Kline, Ranking Member
Health, Employment, Labor & Pensions Subcommittee
of the U.S. House Committee on Education & the Workforce
By Facsimile & electronic mail

Dear Representatives Andrews and Kline,

We write to you on behalf of the Union of Orthodox Jewish Congregations of America to express our **strong support for the bipartisan Workplace Religious Freedom Act** (HR 1431) which your subcommittee will consider at a hearing tomorrow – Tuesday, February 12.

Along with our organization, the Workplace Religious Freedom Act ("WRFA") is supported by a coalition of more than forty-five religious and community organizations spanning the spectrum of faith and politics. WRFA is a bipartisan effort led in the in the House of Representatives by Reps. Souder and McCarthy. The principle which has united these diverse organizations and policymakers is a simple one: that if at all possible and practical, no American should be forced to choose between their career and their conscience.

Prior to 1977, Title VII of the Civil Rights Act of 1964 required employers to reasonably accommodate the religious observances of their employees unless doing so would impose an "undue hardship" upon the employer. In 1977, the U.S. Supreme Court eviscerated this protection for religious workers by holding that if an accommodation imposed even a *de minimis* expense upon the employer, an accommodation was not required under the law. (*TWA v. Hardison*, 432 U.S. 63) WRFA seeks to amend Title VII of the Civil Rights Act to reinstate the protection religious workers require so that they may be faithful to their religion and support their families as well.

WRFA is carefully structured to strike a delicate balance between the needs of employers and employees of faith. It does not impose a strict mandate upon employers to accommodate, but a balancing test which requires accommodation when such would not impose a significant difficulty or expense on the employer and where it would not impede

the employee from performing the essential functions of a position. WRFA will make it more likely that religious employees can wear religious clothing to work, arrange work schedules to have off for holy days and trade work duties which offend their religious conscience to other employees. All of these issues are confronting American employers and employees more and more regularly; WRFA will provide useful guidance to all.

We appreciate your holding a hearing on this important legislation and look forward to continuing to work with you and your colleagues to move HR1431 through the legislative process and protect the religious liberty of all Americans in this important way.

Sincerely,

Rabbi T. Hersh Weinreb

Nathan J. Diament

[Statement of the HR Policy Association may be accessed at the committee website's following address:]

http://edlabor.house.gov/testimony/2008-02-12-HRPolicyAssociation.pdf

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[Whereupon, at 5:10 p.m., the subcommittee was adjourned.]

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